134-594

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~246.~~ 1

THE HOME INSURANCE COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 26, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 246.

THE HOME INSURANCE COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

March 2 1886

1 To the Honorable Samuel Blatchford, associate justice of the Supreme Court of the United States:

And now comes the Home Insurance Company of the City of New York, by Bristow, Peet & Opdyke, its attorneys, and complains that in the record and proceedings, and also in the rendition of a judgment of a plea in the suit between The People of the State of New York, plaintiffs, and The Home Insurance Company, defendant, which is in the supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law and equity of the said State in which a decision could be had, remitting to the said supreme court of the State of New York the record in the said suit, with an order affirming the said judgment theretofore rendered in the said supreme court on the fifth day of February, 1883, in favor of the plaintiffs and against the defendant for the sum of eight thousand thirty-one dollars and seventy-nine cents ($8,031.79), and directing that the same be enforced; upon which direction a judgment of affirmance was entered in said supreme court of the State of New York on the tenth day of May, 1883, with costs, in the sum of one hundred eighteen dollars and ninety-five cents ($118.95), wherein was drawn in question the validity of a statute of said State and of an authority exercised thereunder, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, all which appears in the record
2 and proceedings in said suit, manifest error hath happened, to the great damage of the said Home Insurance Company.

Wherefore the said Home Insurance Company, by its attorneys aforesaid, prays for the allowance of a writ of error and such other process as may cause the said error to be corrected by the Supreme Court of the United States.

BRISTOW, PEET & OPDYKE,
Attorneys for Home Insurance Co.

Allowed May 31, 1883.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

3 [Endorsed:] United States Supreme Court. The Home Insurance Company, plaintiff in error, against The People of the State of New York, defendants in error. Petition for writ of error. Bristow, Peet & Opdyke, attorneys for plaintiff in error, 20 Nassau street, New York city. Filed June 7, 1883.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable justices of the supreme court of the State of New York, in the third judicial department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before you, or some of you, on a remittitur from the court of appeals of the State of New York, being the highest

court of law and equity of the said State in which a decision could be had, remitting to you, or some of you, the final decree or judgment of said court to be enforced in the suit between The People of the State of New York, plaintiffs, and The Home Insurance Company, defendant, wherein was drawn in question the validity of a statute of said State and of an authority exercised thereunder, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Home Insurance Company, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-
5 cerning the same, to the justices of the Supreme Court of the United States, at the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 2d day of June, in the year one thousand eight hundred and eighty-three.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States
for the South. District of New York.

Allowed by—
SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.
May 31st, 1883.

6 [Endorsed:] United States Supreme Court. The Home Insurance Company, plaintiff in error, against The People of the State of New York, defendants in error. Writ of error. Bristow, Peet & Opdyke, attorneys for plaintiff in error, 20 Nassau street, New York city. Filed June 7, 1883.

7 *Agreed Case, under* § 1279, *Code Civ. Proc.*

Supreme Court, General Term, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE HOME INSURANCE COMPANY.

Leslie W. Russell, attorney general, plaintiff's attorney.
Bristow, Peet & Opdyke, defendant's attorneys.

8 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the first day of May, in the year of our Lord one thousand eight hundred and eighty-three, before the judges of said court.

Witness the Hon. Wm. C. Ruger, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur May 1st, 1883.

9 THE PEOPLE OF THE STATE OF NEW YORK, Resp'd't,

ag'st

THE HOME INSURANCE COMPANY, Appell't.

Be it remembered that on the thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-three, The Home Insurance Company, the appellant in this action, came here into the court of appeals, by Bristow, Peet & Opdyke, its attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the supreme court of the State of New York. And The People of the State of New York, the respondent in said action, afterwards appeared in said court of appeals, by Leslie W. Russell, then attorney general, attorney.

10 Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Benjamin H. Bristow, of counsel for the appellant, and by Mr. Leslie W. Russell, attorney general, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed.

And it was further ordered and adjudged that the respondents recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

11 Therefore it is considered that the said judgment be in all things affirmed, with costs as aforesaid, and stand in full force, strength, and effect.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

E. O. PERRIN,

Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *May 1st*, 1883.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] E. O. PERRIN, *Clerk.*

12 N. Y. Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE HOME INSURANCE COMPANY.

The above-named parties agree upon the following case, containing a statement of the facts upon which the controversy between them depends, viz:

I. The Home Insurance Company is, and for more than a year prior to Nov. 1, 1881, had been, a domestic fire insurance company.

II. The capital stock of the Home Insurance Company at all times during the year ending Nov. 1, 1881, was $3,000,000, divided into thirty thousand shares of the par value of one hundred dollars each, all full paid.

III. In the month of January and also in the month of July, 1881, a dividend of $150,000 was declared by the said company. These were the only dividends declared or made during the year ending November 1, 1881, and amounted to 10 per centum upon the par value of the capital stock thereof.

IV. During the year 1881 the said company had part of its capital invested in bonds of the United States, being obligations of the United States, which, by the acts of Congress under which they are issued, are exempt from State taxation, viz., on Jan. 1, 1881,
13 and when the dividend was declared in that month it held such bonds of the par value of $3,300,000; on the first day of July, 1881, and when the dividend was declared in that month, and on November 1, 1881, and when the report hereinafter mentioned was made, it held such bonds of the par value of $1,940,000.

V. On or before November 15, 1881, the report described in section 1 of chapter 542 of the laws of 1880, as amended by chapter 361 of the laws of 1881, was duly made to the then comptroller of the State of New York, on behalf of the said company, a copy of which is hereto annexed, marked "A."

VI. Within fifteen days after January 1, 1882, the Home Insurance Company tendered to the then comptroller of the State of New York a tax at the rate of one and one-quarter mills per cent upon the sum of $1,060,000. The said tender was rejected by the said comptroller. Immediately upon such rejection the said company offered the said comptroller to submit the questions hereby submitted to this honorable court, and requested the comptroller to join in such submission, or in any other test which the latter might desire. The said offer is now and hereby accepted, and the said company has ever since been and now is ready and willing to pay

the amount so tendered to the said comptroller if it shall be adjudged that said acts of 1880 and 1881 are valid in respect of the tax herein controverted.

The Home Insurance Company claims:

(1.) That chapter 542 of the laws of 1880 and the same as amended by chapter 361 of the laws of 1881 are unconstitutional and void, as violative of the provisions of section 20 of article 3 of the constitution of the State of New York.

(2.) That if this be not so, at any rate so much thereof as may require a tax to be paid upon the capital stock of the said company, without deducting from the amount so to be paid a sum bearing the same ratio thereto as the amount of the paid-in capital stock
14 of the said company, invested in bonds of the United States, bears to the total amount of the paid-in capital stock of the said company, is unconstitutional and void.

The above claims are contested by the People of the State of New York. The people insist that the defendant is indebted to the plaintiffs in the sum of $7,500, being a tax of one-quarter of a mill upon defendant's capital stock for each one per centum of dividend made or declared as aforesaid, with interest thereon from January 15, 1882. These questions are hereby respectfully submitted to this honorable court, with the request that it be decided whether any, and, if so, how great a tax ought to be paid by the said company to the said comptroller by reason of chapter 542 of the laws of 1880, as amended by chapter 361 of the laws of 1881.

New York, July 22, 1882.

HOME INSURANCE COMPANY,
By D. A. HEALD, *Second Vice-President.*
[SEAL.] T. B. GREEN, *Assistant Secretary.*
LESLIE W. RUSSELL,
Attorney General.

CITY AND COUNTY OF NEW YORK, *ss:*

D. A. Heald, being duly sworn, says that he is the second vice-president of the above-named defendant; that the controversy hereby submitted is real, and the submission thereof is made in good faith, for the purpose of determining the rights of the parties.

D. A. HEALD.

Sworn to before me this 22d day of July, 1882.
[NOTARY'S SEAL.] EDWARD B. WHITNEY,
Notary Public, N. Y. Co.

15 CITY AND COUNTY OF NEW YORK, *ss:*

On this 22d day of July, 1882, before me personally appeared D. A. Heald, to me known, and known to me to be second vice-president of The Home Insurance Company, the corporation described in, and which executed the foregoing case and submission, who, being by me duly sworn, did depose and say that he resided in Orange, N. J.; that he was second vice-president of The Home Insurance Company; that he knew the seal of said corporation; that the seal

affixed to the foregoing case and submission was the seal of said corporation, and was affixed thereto by its authority, and that he signed his name thereto by like authority.

[NOTARY'S SEAL.] EDWARD B. WHITNEY,
Notary Public, N. Y. Co.

COUNTY OF ALBANY, *ss:*

On this 27th day of July, 1882, before me, the subscriber, personally appeared Leslie W. Russell, attorney general of the State of New York, to me known to be the same person who executed the foregoing submission, and acknowledged to me that he executed the same.

[NOTARY'S SEAL.] GEORGE M. WRIGHT,
Notary Public, Albany Co., N. Y.

16 A.

(Return this to comptroller.)

(Form of report in which any dividend has been declared.)

Report of the Home Insurance Company for the Year Ending the First day of November, A. D. 1881.

OFFICE OF THE HOME INSURANCE COMPANY,
(Give post office address of company,)
NEW YORK, *November 14th*, 1881.

To the comptroller of the State of New York:

Agreeably to law, as secretary of the above company, I make the following report, viz:

Total authorized capital of company, three million dollars.
Whole number of shares of stock authorized, 30,000.
Number of shares of stock issued, 30,000.
Par value of each share, one hundred dollars.
Amount paid into the treasury of the company on each share, $100.
Amount of capital paid in 3,000,000.
Amount of capital upon which dividends were declared, 3,000,000.
Date of each dividend declared, January 17th, and July 15th, 1881.
Amount of each dividend declared, $150,000.
Rate per cent. per annum of dividends, ten.
Amount of profit added to sinking fund.

This company has a part of its capital above mentioned invested in the bonds of the United States, which, by the acts of Congress under which they are issued, are exempt from State taxation; that is to say, that on the first day of January, 1881, and when the div-
17 idend was declared in that month, it held such bonds of the par value of $3,300,000, and on the first day of July, 1881, and when the dividend was declared in that month, it held such bonds of the par value of $1,940,000, so that pursuant to the letter

of the comptroller of 8th January, 1881, this company is liable only for tax on the dividend of 5 per cent. declared in July on $1,060,000 of its capital.

(Duly verified.)

18 At a general term of the supreme court, held in and for the third judicial department, at the city of Albany, on the 2d day of February, 1883.

Present: Hon. Wm. L. Learned, presiding justice; Hon. Augustus Bockes, Hon. Douglass Boardman, associate justices.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE HOME INSURANCE COMPANY.

Judgment, $8,031.79.

FEBRUARY 5, 1883, h. m.

The case agreed between the parties above-named without action, dated the 22d day of July, 1882, and duly verified, having been submitted to this court, and after hearing Mr. Leslie W. Russel, attorney general, for the said plaintiff, and Mr. Benjamin H. Bristow, for the said defendant, and due deliberation having been had, and this court having directed judgment in favor of the plaintiffs for $7,500 with interest thereon from the 15th day of January, 1882, and costs, and the costs having been duly adjusted at the sum herein-

19 after named, it is adjudged and decreed, that the plaintiffs, The People of the State of New York, recover of the defendant, The Home Insurance Company, the sum of $7,975, damages, and $56.79, costs, in all amounting to the sum of $8,031.79, and that the plaintiffs have execution therefor.

JOHN LARKIN, *Clerk.*

20 N. Y. Supreme Court. General Term. Third Department.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HOME INSURANCE COMPANY.

Please take notice that the defendant above named, The Home Insurance Company, hereby appeals to the court of appeals from the judgment of the above-named general term, entered herein in the office of the clerk of the county of Albany on February 5th, 1883, and from each and every part thereof.

Dated New York, February 6, 1883.

Yours, &c.,

BRISTOW, PEET & OPDYKE,
Defendant's Attorneys.

To Hon. Leslie W. Russell, plaintiffs' attorneys; Jno. Larkin, Esq., clerk.

STATE OF NEW YORK, } ss:
City and County of Albany, }

CLERK'S OFFICE.

21 I, John Larkin, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy, return on appeal, with the original thereof filed in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed my official seal, this 9th day of Febr'y, 1883.

[L. S.] JOHN LARKIN, *Clerk.*

22 At a special term of the supreme court of the State of New York, held at the city hall in the city of Albany on the 10th day of May, 1883.

Present: Hon. T. R. Westbrook, justice.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE HOME INSURANCE COMPANY.

On reading and filing the remittitur from the court of appeals to the supreme court herein, directing that the judgment of the supreme court herein heretofore entered which was appealed from be affirmed in all things, and that the plaintiffs, respondent, recover the costs of the appeal to the court of appeals of the defendant, appellant:

Now, on motion of Leslie W. Russell, attorney general, attorney for plaintiffs, it is ordered that the said decision be, and the same hereby is, made the judgment of the supreme court, and that judgment be entered herein affirming the said judgment appealed from, with costs, in the court of appeals.

Enter.

T. R. WESTBROOK,
Jus. Sup. Court.

23 [Endorsed:] Supreme court. The People of the State of New York ag't The Home Insurance Company. Order directing judgment. Leslie W. Russell, attorney general, State hall, Albany, N. Y. Filed May 10, 1883.

24 *Judgment, May 10th,* 1883.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE HOME INSURANCE COMPANY.

An appeal having heretofore been taken to the court of appeals from the judgment of the general term, herein entered February 5th, 1883, in favor of the plaintiffs and against the defendant for the sum of $8,031.79, and said appeal having been duly considered by the court, and a decision having been rendered whereby, said judg-

ment appealed from is in all things affirmed, and directing that said plaintiffs recover their costs in that court from the defendant, as appears by their remittitur to this court, which is this day filed.

Now on reading and filing said remittitur and the order of Hon. T. R. Westbrook, justice of this court, dated May 10th, 1883, making the decision of the court of appeals the decision of this court, and the bill of costs of the plaintiffs in the court of appeals, as taxed this day, and on motion of Leslie W. Russell, attorney general, plaintiff's attorney:

25 It is ordered and adjudged that the said judgment appealed from be, and the same hereby is, in all things affirmed, and that said plaintiffs, The People of the State of New York, recover of the defendant, The Home Insurance Company, the sum of one hundred and eighteen dollars and ninety-five cents ($118.95), their costs in the court of appeals, and have execution therefor.

JOHN LARKIN, *Clerk.*

26 [Endorsed:] Supreme court. The People of the State of New York ag't The Home Insurance Company. Judgment. Leslie W. Russell, attorney general, State Hall, Albany, N. Y. Filed May 10th, 1883, 3.45 p. m.

27 Supreme Court of the United States.

THE HOME INSURANCE COMPANY, Plaintiff in Error,
against
THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

Know all men by these presents that we, Homer Morgan, of the city, county, and State of New York, and Henry M. Taber, of the city, county, and State of New York, are held and firmly bound unto The People of the State of New York, the above-named defendants in error, in the sum of twenty thousand dollars, to be paid to the said People of the State of New York; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this nineteenth day of May, 1883.

Whereas the above-named Home Insurance Company has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the

28 State of New York, upon remittitur from the court of appeals of the State of New York, in an action wherein the above-named People of the State of New York are plaintiffs and the above-named Home Insurance Company is defendant:

Now, therefore, the condition of this obligation is such that if the said Home Insurance Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise, to remain in full force and virtue.

HOMER MORGAN. [L. S.]
HENRY M. TABER. [L. S.]

Sealed and delivered and taken and acknowledged this nineteenth day of May, 1883, before me as to Homer Morgan and Henry M. Taber.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

UNITED STATES OF AMERICA, *Southern District of New York:*

Homer Morgan, of No. 112 East 19th street, city of New
29 York, and Henry M. Taber, of No. 42 West 12th street, city of New York, being duly sworn, say, and each for himself says, that he is worth the sum of forty thousand dollars over and above all his just debts and liabilities.

HOMER MORGAN.
HENRY M. TABER.

Sworn to before me this nineteenth day of May, 1883.

JOHN A. SHIELDS,
United States Commissioner, S. D. of N. Y.

I approve the above bond as to form and sufficiency. May 31, 1883.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

30 [Endorsed:] Supreme Court of the United States. The Home Insurance Company, plaintiff in error, against The People of the State of New York, defendants in error. Supersedeas bond. Bristow, Peet & Opdyke, attorneys for plaintiffs in error, 20 Nassau street, New York city. Filed June 7, 1883.

31 UNITED STATES OF AMERICA, *ss:*

To the people of the State of New York, Leslie W. Russell, attorney general, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the second Monday in October, eighteen hundred and eighty-three, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of New York in and for the county of Albany, wherein The Home. Insurance Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be due to the parties in that behalf.

Dated at the city of New York this 31st day of May, 1883.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

32 [Endorsed:] United States Supreme Court. The Home Insurance Company, plaintiff in error, against The People of the State of New York, defendants in error. Citation. Bristow, Peet & Opdyke, attorneys for plaintiff in error, 20 Nassau street, New York city. Filed June 7, 1883.

33 UNITED STATES OF AMERICA:

STATE OF NEW YORK,
City and County of Albany, } ss:

I, John Larkin, clerk of the said city and county, and also clerk of the supreme and county court, being courts of record held therein, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing papers annexed hereto contain and are a true and complete transcript of the record and proceedings had in said court, including those had upon remittitur from the court of appeals of the State of New York, in the case of The Home Insurance Company, plaintiff in error, against The People of the State of New York, defendants in error, as the same are of record and on file in this office.

In testimony whereof I have caused the seal of the said
34 court to be hereunto affixed, at the city of Albany, in the county of Albany and State of New York, this 18th day of July, in the year of our Lord eighteen hundred and eighty-three and of the Independence of the said United States one hundred and seventh.

[Seal Albany County. July, 1847.]

JNO. LARKIN, *Clerk.*

35 *Opinion of General Term.*

New York Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
against
THE HOME INSURANCE COMPANY.

Leslie W. Russell, attorney general, for the people.
Bristow, Peet & Opdyke, attorneys for Home Insurance Co.

36 Albany General Term, November, 1882.

Learned, Bockes and Boardman.

THE PEOPLE *vs.* HOME INSURANCE CO.

BOARDMAN, J.:

The power and authority of the attorney general on behalf of the State to unite in making this submission under sec. 1279, &c., of the Code of Civil Procedure is not presented by the points of the respective parties, and are not therefore examined or decided.

The unconstitutionality of the laws of 1880, ch. 542 of 1881, ch. 361, is alleged because the object to which the tax is to be applied is not distinctly stated, as required by art. 3, sec. 20, of the constitution of the State of New York. That question was fully considered and decided by this court in The People *vs.* National Fire Ins. Co. of of Hartford, 27 Hun., 188. It is not deemed profitable to reconsider the subject, especially as it will ultimately be deter-
37 mined by the court of appeals. The constitutionality of those laws is therefore sustained upon the authority of the case cited.

The further and only other claim made by the defendant is that the tax in question is a property tax, and from its total amount should be deducted in proportion to the amount of United States bonds owned by the defendant at the time when the tax was assessed. The capital of the defendant was $3,000,000. When the July, 1881, dividend was made the defendant owned in United States bonds, at par value, $1,940,000. The residue of its capital not invested in United States bonds, $1,060,000, it is claimed, is alone liable to taxation on its dividend of five per cent. of that date.

There is no controversy between counsel respecting the power of the State to tax United States bonds. On the part of the plaintiff the tax imposed is justified upon the ground that it is a tax upon the corporate franchise of defendant. The defendant concedes the right of the State to impose a tax upon the corporate franchise or right to do business within this State, but maintains that this is, to all intents and purposes, a tax upon capital and not upon the franchise.

It is a presumption of law that an act of the Legislature duly passed is valid, and its invalidity must be made to appear beyond reasonable doubt. Again, if the act would be held to be valid under a recognized power of the Legislature while void, if referred to a particular clause of the constitution, it shall be so construed as to sustain its validity, if it may fairly be done.

Commonwealth *vs.* People's Savings Bank, 5 Allen, 428, 431–2.

We have, then, in this case, conclusive evidence of the intent of the Legislature in the act itself, which declares the tax in question to be imposed upon "the corporate franchise or business" of the defendant. The amount of the tax may be measured by its capital stock, or by its dividends, or by its gross or net receipts, or by a specific amount.

Burroughs on Taxation, Sec. 83.

38 The reference to the capital stock as a mode of ascertaining the amount of the tax does not make the tax upon the capital stock. The power to tax both the capital stock and the franchise exists. When the capital stock is to be taxed it must be in like manner with other property, but the franchises conferred upon corporations are a distinct kind of property, or, rather, means of acquiring property, which may be charged with payments and conditions in the discretion of the Legislature.

Portland Bank *vs.* Apthorp, 12 Mass., 252, 255.

We start, then, with the legislative declaration of a tax upon franchises. The theory is to impose burdens in proportion to the amount of business done or the success attained. The dividends paid in a series of years are approximately evidence of such success, and hence are made the measure or basis of apportioning the tax. A proportion of such dividends declared by the law is made the amount of the tax. It seems, therefore, to be a tax computed upon the dividends made, and not upon the capital stock. In Provident Institution *vs.* Massachusetts (6 Wall., 611); Society for Savings *vs.*

Coite (*Id.*, 594), a tax of three-fourths of one per cent. upon the average amount of deposits of a savings bank was held to be a franchise tax, and the portion thereof invested in United States bonds not exempt. So in Hamilton Co. *vs.* Massachusetts (6 Wall., 632) a tax of one-sixth of one per cent. upon the excess of the market value of the stock of a corporation above its real estate and machinery is held to be a franchise tax, and is held to be a lawful franchise tax. The latter case is not to be distinguished in principle from the one before us. The subject is discussed to some extent and cases cited in Burroughs on Taxation, sec. 85, and I think the view here taken is fully sustained by the text and authorities.

39 Every franchise tax must affect *pro tanto* the value of the capital stock, and, in that sense, is a burden put upon it. But when we consider the diverse modes of imposing a tax upon capital stock as property, and a tax upon the franchise or right to do business, seems clear that the tax in question is not a property tax, and hence that the claim of exemption in part is not sustained.

Judgment is therefore ordered for the plaintiff for the sum of $7,500, with interest thereon from January 15, 1882, with costs.

Concur: W. L. L., A. B.

I hereby certify that the foregoing is a true copy of the opinion delivered at the general term, in the third department of the State of New York, in January, 1883, in the above-entitled, action & of the whole thereof.

MARCUS T. HOME,
Sup. C't Reporter.

40 *Opinion of Ruger, Ch. J., Affirming Judgment for People.*

In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
against
THE HOME INSURANCE COMPANY, Appellant.

Benj. H. Bristow, for appellants.
Leslie W. Russell, attorney general, for respondents.

41 In the Court of Appeals of the State of New York.

THE PEOPLE, Respondent,
against
THE HOME INSURANCE COMPANY, Appellant.

RUGER, Ch. J.:

It is claimed by the appellant that the law under which the tax involved in this action was imposed is obnoxious to the provisions of section 20 of article 3 of the constitution, in that it does not state distinctly the object to which the tax is applicable.

The statement is that it is "applicable to the payment of the ordinary and current expenses of the State." (Section 9, chapter 542, Laws of 1880.) It was admitted upon the argument by the learned

counsel raising the objection that it would be impracticable to state the object of a prospective tax in all cases without more or less indefiniteness, and that the question actually to be considered was the degree to which such indistinctness might constitutionally extend. It was further conceded that a provision which defined the object of a tax to be the replenishment of the general or any other
42 specified and legally recognized fund of the State treasury, or a provision for any one of these funds or for "unforeseen contingencies," would be a sufficient compliance with the requirement of the constitution.

We think these concessions are fatal to the contention of the appellant.

To sustain his position it would be necessary for the appellant to demonstrate that the specification of some out of many items legally chargeable upon a certain fund is a less distinct statement of the object of a tax than a statement that it is to be applied to replenish the undivided fund itself. It is obvious that this cannot be done. These concessions were, of course, involuntary and such as counsel was by force of controlling adjudications in this court constrained to make. Even in the absence of such admissions the decisions referred to would lead to the same result.

The system by which the finances of the State are classified, and the purposes to which their moneys may be applied, is embodied in numerous acts of the Legislature creating various distinct and separate funds. Among them is a so-called general fund, which is also recognized by the constitution. (Section 2, article 7, of constitution [1 vol. R. S., pp. 493 *et seq*].) Each of these several funds, aside from the general fund, is devoted to some special object, and payment therefrom for any other purpose than that to which it is specially devoted is prohibited by law.

The most, if not all, of the ordinary and current expenses of the State are specifically chargeable to the general fund. (Vol. 1, R. S. [7th ed.], pp. 496 to 500.) In addition to these special provisions it is further enacted that any appropriation made by the Legislature not specially charged to any other fund shall be paid from the general fund. (Vol. 1, R. S., pp. 500 and 501.)

It is thus apparent not only that the payment of all the current and ordinary expenses of the State government is chargeable
43 upon the general fund, but also that of various other necessary expenditures. It seems to follow that if the specification of the replenishment of this fund be held to be a sufficiently distinct statement of the object of a tax within the constitutional requirement, the designation of one or more of the several classes of expenditures lawfully chargeable to that fund would be equally sufficient and distinct. This question has been before this court on several occasions, and the effect of each decision is adverse to the claim made by the appellant.

The first time that it was raised was in the case of The Sun Mutual Insurance Company *v.* The City of New York (reported in 5 Sandford, 10). The statute under which that case arose empowered the board of supervisors of New York county to raise by tax upon

the real and personal property subject to taxation in said county the sum of $1,606,525, and described the object of the tax—that it was "to be applied toward defraying the various contingent expenses legally chargeable to the said city and county, and such expenses as the mayor, aldermen, and commonalty of the city of New York may in any manner sustain or be put to by law." It was held, Chief Justice Oakley delivering the opinion, that the statement of the object of the tax was a sufficient compliance with the constitutional provision. This case was affirmed upon appeal to this court, although the particular question referred to was not discussed in the opinion, and did not even appear to have been mooted. (8 N. Y., 241.) The opinion upon this point, as reported in 5 Sandford, was, however, expressly approved by this court in The People *v.* Supervisors of Orange County (17 N. Y., 235). The law authorizing that tax directed its proceeds to be paid into the State treasury "to the credit of the general fund." It was held that the description of the object of the tax was as distinct as was reasonably practicable, and was a sufficient compliance with the requirement of the constitution.

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Mr. Justice Harris, delivering the opinion of the court, says: "The sum of the whole argument is this: the general fund is a thing long and well known by every intelligent citizen of the State. Its existence is recognized by the constitution itself. It is an object to which money has often been and may now lawfully be appropriated. The Legislature thought fit to make an appropriation to this fund. For this purpose it directed a tax to be levied. It is distinctly stated in the law that this was the object for which the tax was imposed. The constitutional requirement in this respect was thus satisfied." We regard the description of the object of the tax in the law of 1880 to be at least as definite and precise as that considered in either of these cases.

It is quite significant that the framers of the clause, as well as of the constitution of 1846, designated the general fund as the object of a tax laid by that instrument, and thus gave a practical construction by its authors of the meaning of the language under consideration. The financial operations of the State have now been carried on for nearly thirty-seven years under this provision of the constitution, and during each of those years questions involving its practical construction have been presented to each branch of the State government, and have been necessarily considered and decided by the various departments.

The almost uniform description of the object of the annual tax levies in the laws authorizing their imposition has been to require their application "to the purposes of the general fund and for the payment of those claims and demands which constitute a lawful charge upon that fund." Taxes have been levied by the Legislature, collected by the State officers, and disbursed by its authorized agents during this long period, without objection as to the sufficiency

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of such statements or the legality of the method by which these acts were performed, and it would now seem too late to raise a question of such importance and fraught with such dangerous consequences to those engaged in the enforcement of the laws.

If this question were at all doubtful upon authority, this constant and uniform construction by every department of the State government for so long a period would have great, if not controlling, weight upon the interpretation of this provision. We are, therefore, of the opinion that this objection to the constitutionality of the act cannot be sustained.

The only remaining question in the case is whether the State authorities, in taxing corporations under the statutes of 1880 and 1881, are obliged to deduct the amount of stock which such corporations hold in bonds of the United States from the total amount of their capital stock, and compute the tax only upon the dividends derived from the remainder of such capital. The agreed statement of facts in this case shows the total capital stock of the appellants to be $3,000,000, of which the sum of $1,940,000 was, on the 1st day of November, 1881, invested in United States bonds. The annual dividend declared by the corporation for the year preceding that date was ten per cent. upon its entire capital stock. The tax imposed under these acts computed upon such dividend aggregated $7,500. A statement of some of the propositions of law undisputed or conceded by the respective parties will limit the range of citation and discussion. No question was made upon the argument as to the correctness of the propositions that a State Legislature has no power to levy a tax directly, either upon United States bonds held by individuals or corporations, or upon the property represented by such bonds, or the income derivable therefrom; and that a Legislature could not indirectly accomplish an object which it was pro-
46 hibited from attaining by direct and positive legislation. It was also undisputed that a State, in the exercise of its legislative power, has the right to impose taxes upon the business, privileges, and franchises of a corporation organized under its laws, and from which alone it derives its corporate existence and secures protection in the prosecution of its business. In other words, it is admitted that among the legitimate subjects of State taxation is not only the property of individuals and corporations, but in the case of corporations the very right of exercising the privileges granted to them by the State. These several propositions are also abundantly sustained by the authorities. It thus appears that the only question presented for our consideration under this branch of the appeal is whether the tax in question was in fact levied upon the franchises of the defendant, which would be undeniably lawful, or upon the property of the corporation invested in the securities of the general Government, which would be unlawful. It is not claimed that this law in terms assumes to authorize the taxation of the exempted securities, but it is asserted that it effects this result indirectly, and therefore amounts to the exercise of a prohibited power.

This involves an inquiry into the real intention of the Legislature in passing this statute. The appellant claims that we must go behind the object declared by that body, and from the language and effect of the act, as well as from other sources of information, hold its real object to be different from its declared intent. Waiving, for the present, a consideration of the question whether

the court has the right by judicial construction to determine that the Legislature has, in fact, exercised a prohibited power instead of one which it legally might, and which it expressly declared it did exercise, we will proceed to examine the question presented upon the theory advanced by the appellant. In the determination of questions involving the construction of stat-
47 utes, and their validity as depending upon legislative intent, we may doubtless legitimately examine the history of the legislation as well as the act itself and acts *in pari materia*. By such examination we are enabled to see the general nature of the scheme inaugurated by the Legislature and its relation to prior and existing laws concerning taxation. The statutes in question left the corporations still subject to the payment of local taxes (The People *ex rel. v.* Davenport *et al.*, Trustees), always constituting the great bulk of taxation in the State, and attempted by a new system to collect only so much of the burdens laid upon them as inured exclusively to the use of the State, by tax upon their franchise alone. They were expressly exempted from the customary tax laid for State purposes upon their property by the general law, and thus secured some compensation for this franchise tax by a partial exemption from the usual property tax. Not only the object but also the method contemplated by the Legislature were new in many respects. Among other things the law enumerates certain distinct and specified classes of corporations to whom its various provisions shall respectively apply, and for the first time in the history of State taxation the State, as distinguished from the local authorities, intervened directly, not only in the assessment of the tax, but also in its collection and the transfer to the State treasury of the funds thus collected. It also believed to be the first time in the practice of the State that an attempt has been made by a general scheme to impose taxes exclusively upon the franchises and business of corporations organized under its laws, and to exact their payment as a condition upon the exercise of the privileges granted them by the State. The tax complained of was levied under section 3 of chapter 542 of the laws of 1880, as amended by chapter 361 of the laws
48 of 1881, and which, after describing the corporations subject to its provisions, continues as follows: "Shall be subject to and pay a tax upon its corporate franchise or business into the treasury of the State annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company, or association during any year ending with the first day of November amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made and declared." When the dividends are under six per cent. another method of computation is provided, which it is not here essential to describe.

By section 5 of the same act a further tax, eight-tenths of one per centum upon the gross amount of their receipts for premiums, also as a tax upon their corporate franchise and business, was required to be paid by fire and marine insurance

companies annually into the State treasury. The act further provides that such corporations shall be exempted from all further taxation for State purposes, except upon their real property. In case of the intentional neglect or refusal of the corporations bound to report their condition or pay the taxes as therein required, it was provided that an action to recover the tax might be brought by the attorney general, and also that their respective charter and corporate privileges should be forfeited and terminated. We have before seen that the State Legislature had an undoubted right, by virtue of its jurisdiction over corporations organized under its laws, to levy such tax upon their business and privileges, aside from all property taxation, as in its discretion it might deem just and proper, in order to provide revenues for the State. Conceding this, the appellant claims that because the Legislature has directed the amount of this tax to be arrived at in a particular way—*i. e.*, by requiring payment
49 of a percentage upon declared dividends, and because such computation may be based in part upon interest derivable from funds invested in United States bonds, such method necessarily invalidates the tax to the extent of dividends accrued from the capital so invested.

We are unable to see why this precise proposition has not been determined adversely to the appellant, both by this court and by the Supreme Court of the United States. The question was substantially involved in Monroe Savings Bank *v.* City of Rochester (37 N. Y., 365), where it was held that a tax upon the entire surplus of a savings bank levied as a tax upon the franchises of the corporation was not void, although it had a portion of its property invested in United States bonds, and although such bonds were estimated as property in computing the sum upon which the tax was levied. The franchises of a corporation were held to be proper subjects of taxation, the court saying: "It follows that, if such taxation falls within the scope of legislative power, that power may also prescribe a rule or test of value." "It can hardly be denied that a fair measure of the value of the franchises of corporations would be the profits resulting from their use, and in adopting such a rule of estimate no one could justly complain of its being unequal in its effects upon different corporations or unjust in its general operation."

In Society for Savings *v.* Coite (6 Wallace, 594); Provident Institution *v.* Massachusetts (*Id.*, 611); Hamilton Company *v.* Massachusetts (*Id.*, 633), the point here involved was also decided. In the Coite case a law of the State of Connecticut had imposed a tax of three-fourths of one per cent. on the total amount which savings banks had on deposit on a day certain in lieu of all other taxes upon them. The bank had on the day specified upwards of half a million dollars of its deposits invested in United States Govern-
50 ment bonds, and claimed that such amount should be deducted from its gross deposits by the State authorities in levying the tax. Although the law did not in terms purport to levy a tax upon the franchises or business of the corporation, yet the court held that it was a tax upon the franchise, and was a legitimate exercise of the taxing power of the State. The criticism is made upon

this case that the law authorized a tax upon the liabilities of the bank. Even if this were so it would not impair the force of the case as an authority. But the criticism, we think, is not well founded, for admitting that the deposits of a savings bank represent the amount of its indebtedness, they also indicate its ability to pay as well as its financial condition. It would be difficult to devise a more accurate test of the value of the franchise of a savings bank than by taking the amount of its deposits as the measure of its prosperity.

The case of Provident Institution *v.* Massachusetts, immediately following reaffirmed the proposition laid down in the case of Coite, and declared that a tax levied upon the gross deposits of a savings bank was not susceptible to the objection that it was a tax upon Government securities. Mr. Justice Clifford, in his opinion, says: "It is the corporation that is to make the payment, and if it fail to do so it is liable not only to an action for the amount of the tax, but, what is more significant, it may be enjoined from the future exercise of its franchises until all taxes shall be fully paid." And further, discussing the difference existing between franchises and property taxes, he says, in language particularly applicable to this case: "Franchise taxes are levied directly by an act of the Legislature, and the corporations are required to pay the amount into the State treasury. They differ from property taxes as levied for State and municipal purposes in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection."

51 "Comparative valuation in assessing property taxes is the basis and computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation, and the extent to which they have exercised the privileges granted in their charter." This case was followed by the Hamilton Company case, in which the conclusions before reached were again affirmed.

The Legislature of Massachusetts had enacted a statute by which corporations in that State having a capital stock divided into shares were required to pay a tax of one-sixth of one per cent. upon each dollar of the excess of the market value of all such stock over the value of its real estate and machinery. The Hamilton Company had invested $300,000 of its capital in the bonds of the United States. Some of the questions considered involved the construction of constitutional provisions and statutes not applicable here, but the broad doctrine was announced that a law which apportioned a tax upon the franchise of a corporation according to the value of its capital stock, although such capital stock was partially invested in securities exempt from taxation, was not for that reason invalid. The main question argued was that, inasmuch as no express authority existed under the State constitution to tax the business or franchises of a corporation, unless comprehended in the word "commodities," whether that word conferred the necessary power, and it being held under the long settled decisions of the State courts that the term did confer such power, the Supreme Court affirmed the validity of the tax as a tax upon franchises and not upon property. Mr. Justice Clifford, who also wrote in this case, says: "All trades and

avocations by which the citizens acquire a livelihood may also be taxed by the State for the support of the State government.
52 Power to that effect resides in the State independent of the Federal Government, and is wholly unaffected by the fact that the corporation or individual has or has not made investments in Federal securities."

In neither of the three cases cited was it claimed or suggested upon the argument that if the State Legislature had in terms laid the tax upon the business or franchise of the corporation, any question as to the validity of the tax could have been successfully raised, but, on the contrary, it was clearly held that the State, having power to tax the franchise of corporations, and having exercised the power, the court would ascribe such exercise to the power which authorized it, although the act levying the tax did not specially designate its character.

Applying the tests derived from these authorities, it seems conclusively established that the act under which this tax was levied must be held to have imposed a franchise and not a property tax, and that its enactment constituted a lawful exercise of legislative power. It is levied upon corporations alone, and one of the penalties provided for its non-payment is the forfeiture of their charter. The amount of the tax is dependent upon their business prosperity as evidenced by their capacity to declare dividends, instead of upon the value of the corporate property, and it is made payable by the corporations affected directly to the State authorities. The income of these corporations is referred to only as a means of arriving at the measure of their liability. As was said in the Provident Institution case: "The subject-matter to be taxed is the corporation, and the average amount of the deposits within the period named furnishes the basis of computing the amount." It was conceded on the argument that neither by statutory or judicial authority had any fixed basis for computing the taxable value of a corpo-
53 rate franchise been established, either by the State or Federal Governments. It necessarily follows that this question must be decided according to the judgment and discretion of the bodies having authoritry to tax such privileges as the occasion for such a decision may from time to time arise. Having this power, and having professed to exercise it in a given case, it is not easy to see upon what principle a court can judicially ascribe the legislative action to another power which the Legislature is prohibited from exercising. The contention is that we should hold that the Legislature has really imposed a tax upon property while professing only to tax a franchise. In other words, the rule of construction claimed is that we should impute to the Legislature an unlawful intent in a case where its action is plainly sustainable upon justifiable grounds. Well and long settled rules forbid us from placing such an interpretation upon statutory enactments, and rather require us to make every reasonable intendment to uphold rather than to nullify the exercise of legislative authority. The authorities cited would seem to require us to hold this law valid as a tax upon franchise, even

though that character had not been expressly ascribed to it by the Legislature by the very terms of the act.

The case of the Hamilton Company goes much farther than we need go to sustain the judgment appealed from. There, although the value of exempted bonds held by a corporation entered directly into the computation of the amount of a proposed tax, no portion of the tax was deemed to have been invalidated thereby. If the principal of such bonds can be considered as a basis for computing the amount of a franchise tax, the partial consideration of the income of such bonds for a similar purpose must be equally objectionable.

We have examined Pennsylvania cases cited by the appellant in support of the proposition that a tax like the one in question had there been judicially decided to be a tax upon capital stock. They do not appear to us to support that proposition. The cases arose under local statutes and were controlled by special provisions therein contained. It is true some of them hold that a case where the State officers were authorized to tax capital stock alone, the imposition of a tax by them, in which the amount of the tax was determined by the amount of corporate dividends declared, was a tax upon capital stock. This conclusion was reached by force of the rule contained in the maxim, "*ut res magis valeat, quam pereat*," the court holding that the dividends which were there made the basis of the tax were merely referred to as a means of arriving at the value of the capital stock, which was in fact the subject of taxation. If these cases can be assumed to hold beyond this, they conflict with Hamilton Company *v.* Massachusetts and Monroe County Bank (*supra.*)

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It is further strenuously contended by the appellants that because the amount of the tax authorized to be levied upon corporations dividing less than six per cent. annually shall be graduated by the appraised value of their capital stock it necessarily follows that the tax in question must be held to be a tax upon capital stock and not upon the franchise. The cases above cited hold directly the contrary. We also think it may safely be assumed that so long as a corporation continues business under its charter, the privilege of so doing is of some pecuniary value to it, and that there is no valid reason why the value of the capital stock may not be used as an element for determining the amount of tax levied upon the franchise, and why it will not in each year approximate its variable taxable value quite as accurately as any other method. In the present case the dividends are used to determine the value of the corporate franchise, and there is no inconsistency in these modes of estimating the respective values of capital stock and of corporate franchises. The prosperity of a corporation will affect equally the value of its franchises and the market value of its capital stock, or, in other words, what enhances the value of the franchise will raise the value of its capital stock, and while the one may in the aggregate be more greatly enhanced than the other, yet they may equally afford a just method of arriving at

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the taxable value of the respective subjects. The operation of the same law determines the relative value of both stock and franchise.

The title to the stock involves the ownership of the property of a corporation, including its franchise, and variations in the value of such stock, as affected by its prosperity, indicate by necessary relation the comparative variations in the value of its franchise.

We are unable to see any force in the objection raised to this law that various corporations subjected to its provisions are thereby subjected to unequal or double taxation. Corporations are, of course, alone subject to the payment of franchise taxes, and they may be divided into as many classes as the different pursuits followed by them may require. (Railroad Tax Cases, 92 U. S., 575.) The rate of taxation provided by the act seems to be justly and equitably apportioned and to bear equally upon each of the classes named therein who stand in similar relations to each other. Absolute equality in laying the burdens of taxation, as shown by experience, is impossible of attainment, and it is not an insuperable objection to a law that it does not accomplish that result. (Commonwealth *v.* The People's Five-Cent Savings Bank, 5 Allen, 428; Bank of Chenango *v.* Brown, 26 N. Y., 467.) In the consideration of the effect and meaning of laws imposing taxes it would undoubtedly be the duty of the court to so construe them, if possible, as to avoid unequal and double taxation, but in determining the question of legislative power
56 we are precluded from entertaining such considerations and must be governed by the constitutional authority conferred upon the legislative body. In performing the duty of levying taxes for the support of government State Legislatures may, in the exercise of their undoubted power, impose double taxes or lay burdens beyond the financial capacity of the classes taxed, and however impolitic or unwise such a course would be the courts have no right to interfere with the exercise of the legislative discretion. (The People *v.* The Mayor of Brooklyn, 4 N. Y., 419; Gordon *v.* Cornes, *infra.*) Such questions properly belong to the legislative branch of the Government, whose exclusive duty it is to apportion and impose the taxes required for the use of the Government. (Monroe County Bank *v.* Rochester, *supra;* Gordon *v.* Cornes, 47 N. Y., 608; Litchfield *v.* Vernon, 41 N. Y., 124.) If this question was open for examination in this court upon principle we think the plan adopted by this law for determining the taxable value of corporate franchises is fair and equitable and affords no reasonable cause for complaint.

The tax is governed by actual results, and is measured exclusively by the prosperity of the corporation taxed as shown by the profits voluntarily distributed among its shareholders. The mode of assessment seems to be governed by just principles and to adapt itself to the variable character of the property. The amount is so graded that it rises and falls with the fluctuations in the prosperity of the business of the corporation. The various processes which are so essential in securing equality and fairness in distributing the burdens of property taxes are rendered inapplicable and unnecessary by a rule which refers the valuation of the thing taxed to the owner of the property, without reference to the actual value of his invested

or accumulated property, and is based upon the principle by which a business tax alone is supported. It must be borne in mind
57 that this tax is a fractional tax, for which an equivalent property tax has been surrendered, and thereby substantial equality of taxation may be presumed to have been produced even as between individuals and the corporations taxed. In this case the propriety of the method is made apparent from the fact that, although nearly two-thirds of the capital of the defendant is invested in Government bonds, but about one-quarter of its income is derived from that source.

It would seem that these corporations could not fairly claim exemption for more than the proportionate amount of income which is derived from investment in exempted securities, but we feel constrained to hold, in accordance with the principles laid down in the cases cited, that the tax in question was a tax upon franchises alone, and was therefore within the exercise of legitimate legislative power.

The judgment should be affirmed.

"All concur."

(A copy.)

H. E. SICKELS, *Reporter*,
Per C.

58 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, Edwin O. Perrin, clerk of the court of appeals of the said State of New York, do hereby certify that the annexed is a true copy of the opinion of the court of appeals in the case of "The People of the State of New York, respondents, against The Home Insurance Company, appellant," and of the whole of said original.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this 11th day of July, A. D. 1883.

[Seal of Court of Appeals, State of New York.]

W. H. SHANKLAND,
Deputy Clerk.

Endorsed on cover: New York supreme court. No. 96. The Home Insurance Company of New York, plaintiff in error, *vs.* The People of the State of New York. Filed 26th July, 1883.

October Term, 1886. No. 14.

SUPREME COURT OF THE UNITED STATES.

ERROR TO THE SUPREME COURT OF NEW YORK.

THE HOME INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Defendants in Error.

BRIEF

FOR PLAINTIFF IN ERROR.

B. H. BRISTOW,
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BURGOYNE'S "Quick" Print, 146-150 Centre St., N.Y.

Supreme Court of the United States,

ERROR TO THE SUPREME COURT OF NEW YORK.

THE HOME INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
AGAINST
THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

Brief for Plaintiff in Error.

STATEMENT.

The plaintiff in error is an insurance company of New York (p. 12). By chapter 542, section 3, of the laws of that state for 1880, there was imposed upon such corporations, among others, a tax to be computed as follows: if the dividends declared during the year did not amount to six per cent, then the tax to be at the rate of one and a-half mills upon each dollar of the actual value of the capital, but if the dividends amounted to six per cent or more, then the tax to be at the rate of one-quarter mill upon the capital for each one per cent of dividend declared; and in case the corporation had common stock upon which it had paid less than six per cent, and preferred stock upon which it had paid six per cent or more, then the corporation was to pay at the rate of one and a-half mills upon the actual value of the common stock, and one-quarter mill for each one per cent of dividend declared upon the preferred stock. By chapter 361, section 3, of the laws of 1881, there was inserted in the act a definition of the tax as "a tax upon corporate franchise or business.'

During the year 1881, the defendant paid dividends at the rate of more than six per cent. This brought it within the provision of the

statute as amended, imposing "a tax, as a tax upon its corporate "franchise or business, to be computed as follows: * * at the "rate of one-quarter mill upon the capital stock for each one per "cent of dividend." The defendant had a large part of its capital stock invested in bonds of the United States. It claims that, for that year, it is taxable under this act only upon the part of its capital not so invested. The State, upon the other hand, claims that it is taxable upon the basis of its entire capital (p. 14).

An agreed case (Code of Civil Procedure, Sec. 1279) stating the facts was submitted by the parties to the Supreme Court of New York (pp. 4, 5). The State had judgment (p. 7). This the Court of Appeals affirmed (p. 3; 92 N. Y., 328), and final judgment upon the remittitur was entered in the Supreme Court (pp. 8, 9). To that judgment defendant sued out this writ of error upon the ground that "there was drawn in question the validity of a statute "of the state and of an authority exercised thereunder, on the ground "of their being repugnant to the constitution or laws of the United "States, and the decision was in favor of such their validity (p. 2).

ASSIGNMENT OF ERROR.

The judgment was erroneous in holding that the defendant was liable for a tax computed upon the basis of its entire capital. It should have held that the defendant was liable only for a tax upon that part of its capital not invested in United States bonds.

BRIEF OF ARGUMENT.

No tax can be imposed upon that part of defendant's capital invested in United States bonds.

A state cannot burden the operations of the national government by taxing its bonds without its consent (McCulloch vs. Maryland, 4 Wheaton, 316, 436; Weston vs. Charleston, 2 Peters, 449; Banks vs. Mayor, 7 Wall., 16; People *ex rel.* vs. Commissioners, 90 N. Y., 63). A tax upon the capital of a corporation is a tax upon the property in which the capital is invested. No part of the capital invested in United States bonds, therefore, is taxable. This is fully established in this court.

In Bank of Commerce vs. New York (2 Black, 620), a statute of New York imposed a tax upon the capital of the bank at its actual

value. Part of the capital was invested in United States bonds. It was held, (NELSON, J.), that the tax did not cover the capital so invested. The reason given was that this would be a tax upon the exercise of the power of congress "to borrow money on the credit of the United States," and that the attempted exercise of state authority in such cases would be in derogation of the powers granted to the national government within which it is supreme. "If the "encroachment or usurpation to any extent is admitted," the court said, "the principle involved would carry the exercise of the "authority of the state to an indefinite limit, even to the destruction "of the power." The same thing was ruled in Bank of the Commonwealth vs. Commissioners of Taxes decided at the same term.

Again, in the Bank Tax Case (2 Wallace, 200), the New York statute had been changed so that the bank was taxable upon "the "valuation equal to the amount of the capital stock paid in or "secured, and the surplus earnings (less ten per cent)." The capital of the bank was invested in United States bonds. The court, (NELSON, J.), said that the intent of the law-makers was plainly merely to change "the mode of ascertaining or fixing the "amount of the capital of the banks which is made the basis of "taxation. * * When providing for a tax on the capital at a "valuation the legislature could not have but intended a tax upon "the property in which the capital had been invested. * * "Such is the practical effect of the tax and we think it would be "doing injustice to the intelligence of the legislature to hold that "such was not their intent in the enactment of the law." It was, therefore, held that this was a tax on the property of the corporation, and did not apply to United States bonds. At the same term the court decided twenty-four other similar cases upon precisely the same grounds.

If, then, this be a tax upon capital, it is without application to the part of defendant's capital stock invested in United States bonds.

Whether or not this is a tax upon capital is to be determined, not by the form of the statute, but by its effect.

When the statute was first enacted the legislature merely imposed the tax. The following year it inserted the definition thereof

"as a tax upon corporate franchise or business." But if the tax is, in its nature and effect, a tax upon capital, it is none the less so because of this amendment declaring it to be a tax upon franchise or business. The question is whether or not the tax is such as the legislature can impose. This obviously must be decided by the courts irrespective of any declaration as to the character of the tax by the legislature itself.

In Brown vs. Maryland, 12 Wheaton, 419, a state statute required all importers of foreign goods to take out a license and pay a fee. The court held that this was a regulation of commerce. It said, (MARSHALL, C. J.), "but if it "should be proved that a duty on the article itself would "be repugnant to the constitution, it is still argued that "this is not a tax upon the article but on the person. The "state, it is said, may tax occupations, and this is nothing "more. It is impossible to conceal from ourselves that this is "varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a "particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for "sale. is a tax on the article itself." The same thing was ruled in Ward vs. Maryland, 12 Wall., 418; Welton vs. State, 91 U. S., 275; Webber vs. Virginia, 103 U. S., 344, and Walling vs. Michigan, 116 U. S., 446.

In Smith vs. Turner (Passenger Cases), 7 How., 283, a state statute provided that the health officer of the port of New York should collect from the masters of vessels a certain sum for each passenger. The moneys were to be used in supporting the Marine Hospital. Yet this was held to be a regulation of commerce. The court said, (GRIER, J., p. 459), "the "state cannot do that indirectly which she is forbidden "by the constitution to do directly. * * We have "to deal with things, and we cannot change them by changing their names. Can a state levy a duty on vessels engaged in commerce and not owned by her own citizens, by "changing its name from a duty on tonnage to a tax on the "master, or an impost upon imports, by calling it a charge on "the owner or supercargo, and justify this evasion of a great "principle by producing a dictionary or a dictum to prove that "a ship captain is not a vessel, nor a supercargo an impost?"

In Henderson vs. Mayor, 92 U. S., 259, a state statute provided that the owners of steamers bringing passengers from foreign ports should give a bond for each passenger against his becoming a public charge, or, at their option, make a cash payment. It was claimed that, as the object of the provision was not taxation but protection against pauperism, it was valid as within the police power. But the court, (MILLER, J.),

held otherwise. It said, "in whatever language a statute may "be framed its purpose must be determined by its natural and "reasonable effect" (p. 268). It was apparent that the object of the statute, as judged by that criterion, was to compel the owners of vessels to pay a sum of money for every passenger brought in, and, therefore, it was a regulation of commerce. To the same effect is Chy Lung vs. Freeman, 92 U. S., 275.

In Inman Steamship Co. vs. Tinker, 94 U. S., 238, a state statute provided that certain fees should be collected from vessels. The court, (SWAYNE, J.), said, "the name of this imposition is "immaterial; it is the substance we are to consider," and held that it was unconstitutional as a tonnage duty.

In Cook vs. Pennsylvania, 97 U. S., 566, state statutes required auctioneers to take out a license, and to collect and pay into the state treasury a percentage upon all sales of goods of foreign manufacture. It was conceded that, if this was a tax upon the goods, it was unconstitutional. But it was contended that the authority of the auctioneer to make sales was derived from the state; that the state could, therefore, impose upon him a tax for the privilege conferred, and that this was not a tax on the articles sold, but the amount of the sales made was merely the measure of the tax on the privilege. The court, (MILLER, J.), held that this tax on the privilege of selling foreign goods at auction was a tax upon the goods so sold.

In Transportation Co. vs. Parkersburg, 107 U. S., 691, a city ordinance fixed certain rates of wharfage. The suit was to enjoin proceedings at law for collection thereof. Its ground was that the ordinance was merely a subterfuge to impose a duty upon tonnage, and, therefore, unconstitutional. The court held that the intent of the ordinance was not material. Whether the charge was a charge for wharfage or a duty on tonnage must be determined by its provisions. And, upon examination, it was decided that the charge which resulted therefrom was a charge for wharfage (pp. 695, 696). In short, it was held to be quite immaterial what the legislative body intended to do. The crucial question was what it, in fact, did.

In the Matter of Jacobs, 98 N.Y., 98, a statute provided that the manufacture of tobacco in any form on any floor in a tenement house was prohibited, if any part of such floor was occupied by any persons as a residence, and violation thereof was declared a misdemeanor. The act was entitled, "An act to improve the "public health by prohibiting the manufacture of tobacco in "any form in tenement houses in certain cases." It was contended that this violated the constitutional provision that no person shall be deprived of his property without due process of law. In answer to this it was claimed that the law was an exercise of the police power. The court held that the declaration contained in the statute was not conclusive upon the subject. "It matters not that the legislature

" may, in the title to the act, or in its body, declare that it is " intended for the improvement of the public health. Such a " declaration does not conclude the courts, and they must yet de- " termine the fact declared and enforce the supreme law. * * " The legislature may condemn or authorize the condemnation " of private property for public use, and it may, in the " exercise of its discretion, determine when and upon what " property the power of eminent domain may be exercised; but " its exercise is not beyond the reach of judicial inquiry. " Whether or not a use is a public one, which will justify the " exercise of the power, is a judicial question. Although " the legislature may declare it to be public, that " does not necessarily determine its character; it must in fact " be public, and if it be not, no legislative fiat can make it so, " and any owner of property attempted to be taken for a use " really private can invoke the aid of the courts to protect his " property rights against invasion."

See to the same effect,

Almy vs. California, 24 How., 169.
Bank Tax Case, 2 Wall., 200.
Cummings vs. Missouri, 4 Wall., 277, 325.
Crandall vs. Nevada, 6 Wall., 35.
State Freight Tax, 15 Wall., 232.
Hannibal, etc., R. R. Co., vs. Husen, 95 U. S., 465.
Telegraph Co. vs. Texas, 105 U. S., 460.
Moran vs. New Orleans, 112 U. S., 69.
Kentucky Railroad Tax Cases, 115 U. S., 321, 337.
Pullman Co. vs. Nolan, 22 Fed. Rep., 276, 281.
People vs. Allen, 42 N. Y., 404, 413.
Matter of Deansville Cemetery Association, 66 N. Y., 569.

Clearly, therefore, the declaration by the legislature that this is a tax on franchise or business is not controlling. " The name of this imposition is immaterial; it is the substance we are to consider" (Inman Co. vs. Tinker, 94 U. S., 238).

The statute has not the effect of imposing a tax upon franchise or business.

The modes in which the franchises of a corporation may be taxed are clearly defined. It may be done by imposing a fixed sum, or " a " graduated contribution proportioned either to the value of the privi- " leges granted, or to the extent of their exercise, or to the results of " such exercise " (State Tax on Railroad Gross Receipts, 15 Wall., 284; Delaware Railroad Tax, 18 Wall., 206, 231). These provisions of the act do not impose a fixed sum. Nor do they impose a contribution proportioned to the extent of the exercise of the franchise—

to the amount of business done. That species of tax is imposed by section 5 of the same act. But these provisions do not refer to the amount of the business in any way. Is this, then, "a contribution proportioned to the value or results of the privileges granted"?

The franchise is "the right to use the tangible property in a spe- "cial manner for the purposes of gain" (State Railroad Tax Cases, 92 U. S., 575). It is itself a part of the property of the corporation, but quite distinct and separate from its tangible property (Gordon vs. Appeal Tax Court, 3 How., 133, 150; Wilmington Railroad vs. Reid, 13 Wall., 264, 265). It is a thing "capable of appraisal and ascer- "tainable by evidence, and is frequently made the subject of taxa- "tion by the sovereign power. It is a right separate and distinct "from the capital and moneyed assets of a corporation, and as to the "value of which they furnish no evidence" (Conaughty vs. Saratoga Bank, 92 N. Y., 401).

See to the same effect—

Veazie Bank vs. Fenno, 8 Wall., 533, 541, 547.
Monroe Savings Bank vs. Rochester, 37 N. Y., 365, 367.
Porter vs. Rockford Co., 76 Ill., 561, 578.

Its value is readily ascertained. It is determined by subtracting from the total actual value of the capital stock the total value of all items of property other than franchise. The remainder is, of course, the value of the franchise—the value of the right to use the tangible property in a special manner for the purposes of gain.

This method has the approval of this court (State Railroad Tax Cases, 92 U. S., 575, 602–607). It is approved elsewhere as well (Spring Valley Works vs. Schottler, 62 Cal., 69, 117; Burke vs. Badlam, 57 Cal., 594; San José Company vs. January, *Id.*, 614).

Here neither the value of this part of the property of the corporation nor the results of its use are in any way ascertained. It is claimed that this is a tax upon the franchise or its results, upon the ground that the tax is measured by the profits resulting from the use of the franchise—by the capacity of the company to declare dividends (p. 20).

This is clearly erroneous. The tax is a percentage upon that part of defendant's income which it has distributed in dividends—its net income or profits—without discrimination as to the source thereof. This, of course, is a tax upon the property from which the income arises. (Bank of Kentucky vs. Commonwealth, 9 Bush, 46; Opinions of Justices, 53 N. H., 634; People *ex rel.* vs. Commissioners, 90 N. Y.,

63; Weston vs. Charleston, 2 Peters, 472, 475, 478). But the franchise is only one part of defendant's property. It is only in part the source of the dividends or net profits. They are the product of all the property. Indeed from the franchise without the other property no dividends or profits could possibly be made. This tax upon the entire amount of such dividends or profits is, therefore, a tax upon the value or result of the franchise only to the same extent and in the same manner that it is a tax upon the value or result of every other item of defendant's property including its United States bonds. And, as it includes property not taxable, it cannot be sustained as a tax on the franchise (Santa Clara County vs. Southern Pacific Co., 118 U. S., 394).

> The suggestion made below, that this is a franchise tax because paid to the State directly and in lieu of all other state taxes, is without weight. That might be the case equally if the tax were, in terms, imposed upon capital stock. Indeed the inference properly is that this is a property tax. For it was imposed in lieu of "the customary tax laid for state purposes upon property by the general law" (p. 17).
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> That this is not a tax upon the result of the franchise, or, in other words, the business, is manifest from comparison of the provisions imposing such a tax which are contained in section 5 of the same act. The two are totally different.

These propositions are self-evident. But the State claims that this court is already committed to the view that this is a tax upon franchise. And the court below placed its decision chiefly upon this ground (pp. 18, 20, 23). The cases relied upon are as follows:

> In Society for Savings vs. Coite, 6 Wall., 594, a statute of Connecticut required savings banks to pay a tax equal to a certain percentage upon the amount of their deposits on a certain day. It was claimed that, in so far as the deposits had been invested in United States bonds, the tax was bad. But the court (CLIFFORD, J.) upheld the tax on the ground that "reference was made to the total amount of the deposits, not as "the subject matter for assessment but as the basis for computing the tax required to be paid (p. 608). * * Deposits "are not capital stock in any point of view, and are not even "investments in the sense in which the word is employed in "the provision (p. 610). * * The assessment required to be "made is wholly irrespective of value or of profit or loss (p. 610). "Neither investment nor the value of the deposits being "mentioned in the provision, it seems clear that they are unimportant in this investigation, as the amount of the tax is the "same whether the deposits, on the day named, have or have "not been invested, and whether they are above the par value "or of no value at all. Moneys received constitute deposits in

" the sense in which the word is used in that provision, and the " total amount of such deposit on that day furnishes the true " basis of computation wholly irrespective of their market value " or of the disposition of the funds made by the defendant" (p. 611).

In Provident Institution vs. Massachusetts, 6 Wall., 611, a statute of Massachusetts imposed a similar tax upon savings banks measured by the amount of their deposits. The question as to its application to United States bonds, therefore, was identical with that involved in the last case. The court said, (CLIFFORD, J.), " deposits, as the word is employed in the section, are the sums " received by the institution from depositors without regard to " the nature of the funds. They are not capital stock in any " sense, nor are they even investments, as the word is there " used, which simply means the sums received, wholly irrespec- " tive of the disposition made of the same or their market value " (p. 627). Valuation of property has nothing to do with deter- " mining the amount of the tax, but the amount depends on the " average amount of the deposits, * * and it is quite obvious that " there is no necessary relation between the average amount of " the deposits and the amount of the property owned by the " institution (pp. 630, 631). Comparative valuation in as- " sessing property taxes is the basis of computation in ascer- " taining the amount to be contributed by an individual, but " the amount of a franchise tax depends upon the business trans- " acted by the corporation and the extent to which they have " exercised the privileges granted in their charter" (p. 632). But the court upheld the tax especially upon the ground that the local courts, as stated in the next case, had held such taxes to be taxes not upon property but upon franchise, and that this court was bound by such decisions (p. 630).

In Hamilton Co. vs. Massachusetts, 6 Wall., 632, a statute of the state required certain corporations, including the Hamilton Company, to pay a tax to the state, in lieu of all other taxation, of a percentage on the excess of the market value of their capital stock over the value of their real estate and machinery as returned by the local assessors. Its capital stock was partly invested in United States bonds. The state courts had long held that this statute, construed in connection with certain provisions of the state constitution, imposed a tax upon franchise. This court held that it was bound by this construction by the state courts of their own constitution. It stated the grounds of its decision as follows, (CLIFFORD, J.): " separated from the peculiar " provisions of the state constitution and a long practice under " the original decision, the present decision of the state court " upon the subject might well be criticised as founded in unsub- " stantial distinctions, but, when weighed as an exposition of " that peculiar clause, and, in view of the long practice of the " state commencing long before the prior decision was made, it " is not possible to withhold from the conclusion, a full and un-

" qualified concurrence " (p. 640). " Such was the construction " given to the term by the supreme court of the state more than " fifty years before the present controversy arose, and the rule is " well settled in this court that the construction of the consti- " tution or statute of a state by the highest judicial tribunal of " such state in a case not involving any question under the 25th " section of the judiciary act, is to be regarded as a part of the " provision, and that it is as binding upon the courts of the " United States as the text " (pp. 640, 641).

These cases, then, were decided upon two grounds. (1) It was held that a tax consisting of a percentage upon the deposits made with a savings bank, is a tax upon its franchise or business, and not a tax upon the property in which such deposits may be invested after they are received. (2) It was held, further, that the decision of the state court, although criticised in one of the cases as "founded in unsubstantial distinctions," was binding upon this court. Whatever may be thought of the soundness of this (Louisville Co. vs. Palmes, 109 U. S., 244), it has no present application. For it is not sought to sustain the present tax by any decision of the courts of the State construing the statute by which it is imposed.

The former ground, it has been claimed, controls the present case. Clearly this cannot be so. The question now involved is entirely different. There the tax was a percentage upon the deposits," simply the sums received, wholly irrespective of the disposition made of the same " (6 Wall., 627). The liability arose by reason of the receipt of the deposit. It was quite immaterial what became of the money after it was received, whether or how it was invested, or what profit was realized from it. Those circumstances could in no way affect the liability—they could neither increase it nor diminish it. For, of necessity, they must be preceded by the act from which sprang the matured and complete liability—the receipt of the money. That and that alone was selected by the legislature for taxation at a percentage of the amount received. The statute did not in the slightest degree contemplate or relate to anything occurring thereafter. These were precisely the considerations which led the court to hold that the tax was laid upon the franchise or business of receiving money on deposit—upon "the extent to which they, (the banks), had exercised the privileges granted by their charters " (6 Wall., 632).

But in the present case the tax is not measured by the moneys received by defendant—by the volume of its business, the extent to which it has exercised its franchise. The tax is a percentage compounded of two factors, the capital and the dividends. That is

to say, it is measured by defendant's permanent investment in the business and the net profits realized from its entire property.

In the cases in 6 Wallace, then, the tax was independent of the tangible property of the corporation or any profits therefrom. Whether they existed or not the tax was fixed. The court, therefore, held that it was not a tax thereon. But here the tax depends entirely upon the amount of defendant's property and the profits therefrom. Until they are acquired there can be no tax. The tax is measured solely by their amount. So far from being similar, these modes of taxation are almost exactly the reverse of each other. In those cases the tax came before property and profits. Here property and profits must come before the tax. There the burden of the tax rested upon the franchise. But here, clearly, the ultimate burden rests upon the property of defendant invested in part in United States securities. That, therefore, is the subject of the tax (State Freight Tax Case, 15 Wall., 232).

The decision that even a tax consisting of a percentage upon all sums received by a savings bank was a tax upon franchise, was arrived at by a majority of the court, and in the face of emphatic dissent by three of the judges. That decision, therefore, should not be regarded as expressing the views of the court, save in cases identical in their facts. Much less can it be regarded as committing the court to the view that a tax upon the defendant which is a percentage upon its capital and surplus earnings distributed as dividends, is a tax upon corporate franchise. On the contrary, the court repeated in those cases the rule laid down in the Bank Tax case that "a tax levied under "a law of the state" (enacting that corporations shall) "be liable "to taxation on a valuation equal to the amount of their capital and "their surplus earnings (is) a tax on the property of the corporation" (6 Wall., 629). These authorities, therefore, are wholly without present application.

Neither upon principle nor authority has the statute the effect of imposing a tax upon franchise or business.

This is, in fact, a tax upon capital at its actual value, and, therefore, does not apply to that part of defendant's capital invested in United States bonds.

The act as originally passed speaks of corporations to which it applies as "*liable to be taxed on their capital stock as provided*" therein (Laws of 1880, Ch. 542, Sec. 1), and provides that "*the cap-*

" *ital stock and personal property* of said corporations shall be ex- " empt from taxation, *except as in this act prescribed*" (*Id.*, Sec. 8). In 1881, it is true, the legislature, in order to avoid the effect of the Bank Tax case, changed the name of the tax (Laws of 1881, Ch. 361, Sec. 3) and made corresponding changes in the language of these provisions. But no change whatever was made in the character of the tax or in the method of its computation or collection. Indeed, in 1882 the legislature passed an amendment in which the capital stock is again described as " the basis for tax under the provisions of this act " (Laws of 1882, Ch. 151, Sec. 1), and this was repeated in 1885 (Laws of 1885, Ch. 501, Sec. 11). In the latter year, too, it was enacted that the amount of capital stock which should be " the basis for tax " in the case of all corporations liable to taxation, should be the amount of the capital employed within this state *(Id.)*. That is to say the place where the capital is employed—not where the franchises are granted—controls the amount of the tax. These statutory provisions clearly indicate that the tax is upon capital.

And, unless that be the case, the statute must have most incongruous and unequal effects. For the purposes of the tax, corporations are of three classes, (1) those which have paid less than six per cent dividends ; (2) those which have paid six per cent, and (3) those which have paid more than six per cent. Those which have paid less than six per cent are taxed one and a half mills per dollar of the actual value of their capital stock. Those which have paid six per cent are taxed one and a half mills per dollar of the amount of their stock. Those which have paid more than six per cent are taxed for each additional one per cent of dividend one-quarter mill more per dollar of the amount of their stock. In case a corporation has preferred stock upon which it has paid six per cent, and common stock upon which it has paid less, it is taxed upon the preferred stock at the rate of one and a half mills of the amount thereof, and upon the common stock at the rate of one and a half mills per dollar of actual value (Laws of 1881, Ch. 361, Sec. 3, and re-enacted Laws of 1885, Ch. 359).

In the case of corporations paying less than six per cent, then, the act provides that there shall be a tax upon the " actual value " of their capital. It is settled that a tax in that form is a tax upon the property in which the capital is invested, and that corporations upon which it is imposed are entitled to deduct their United States bonds from the amount of the assessment (Bank of Commerce vs. New York, 2 Black,620; Bank Tax Case,2 Wallace, 200).

But if the tax upon corporations paying six per cent or more be a franchise tax, such corporations will not be entitled to the deduction for their United States bonds to which those paying less than six per cent are entitled. Still further, where a corporation has paid less than six per cent upon its common stock and that amount or more upon its preferred stock, it will be entitled to exemption as to its common stock for the amount of its capital invested in United States bonds, but not as to its preferred stock, although all its capital may be so invested.

If, on the other hand, the tax be a tax upon capital, the statute leads to no such incongruous and unequal results. Those corporations which have paid less than six per cent are taxed one and a half mills per dollar of the actual value of their capital. Those which have paid six per cent are taxed one and a half mills per dollar of the amount of their capital. For, as the stock pays the legal rate of interest, it will presumptively be worth par—its actual value and nominal amount will be the same. Those which have paid more than six per cent are, taxed for each additional one per cent of dividend one-quarter mill more per dollar of the amount of their stock. For, as the rate of dividend rises, the value of the capital will rise above par. So, too, where a corporation has preferred stock which has paid six per cent or more and common stock which has paid less. Thus the rule is uniform in all cases. Each corporation is taxed as nearly as may be on the actual value of its capital stock, both common and preferred.

If, then, this be a tax upon capital, the statute establishes a comprehensive system which bears equally upon all corporations which it affects. If it be a franchise tax, the statute is utterly incongruous and bears unequally both upon different corporations, and also upon different property of the same corporation. This the court below meets by saying that the legislature has power to impose unequal taxes (p. 21). This may be so. But the same court had already laid down the rule that in matters of taxation "it is a sacred "duty to impose the burdens equally, and to enforce the maxim of "law and ethics that equality is equity" (People vs. Commissioners, 76 N. Y., 64, 71). "Equality of taxation is a fundamental principle "of our government which no legislation, in the absence of the most "explicit provisions, will be presumed to have intended to violate" (People vs. Supervisors, 20 Barb., 81, 88, affd., People vs. Supervisors, 16 N. Y., 424). That, doubtless, is the principle of construction to be followed here. The court will, if possible, construe the statute so as

to impose its burdens justly and equally. Especially should this be so when the opposite construction is sought solely for the purpose of imposing a burden upon property which this court has uniformly held to be exempt from taxation by the states.

The statute, indeed, admits of no construction other than that which will produce this result. The tax is a percentage upon the capital. The amount of this percentage varies. But the subject matter taxed remains the same. That is the capital. The rate of tax increases or diminishes with the rate of dividend. There is no method of determining, with absolute exactness, the actual value of the capital stock of a corporation during any considerable period. But no surer standard can be suggested than its results during that period—the dividends which it has earned. For, while market value or any similar test is dependent largely upon expectation for the future, the dividends made during the period in question measure the value of the stock during that time, as shown by experience (Oswego Starch Factory vs. Dolloway, 21 N. Y., 449; Commonwealth vs. Railroad Co., 29 Pa. St., 370; Lehigh Co. vs. Commonwealth, 55 Pa. St., 448). A tax varying in proportion to the dividends must, therefore, vary in proportion to the actual value of the capital stock. The tax, then, is a percentage upon the capital varying with its actual value; or, in other words, a tax upon the capital at its actual value.

> Ever since 1853, it may be remarked, it has been the policy and practice of the State to tax corporations upon the actual value of their stock (People vs. Ferguson, 38 N. Y., 89). At this late day it is suggested that such variation of the rate of taxation shows that the tax is imposed upon the franchise and "measured by its dividend-paying power." But this is a complete misapprehension. A franchise in itself has no dividend-paying power. Dividends are the result, not merely of the franchise, but of all the other property as well.

The provisions of this act have been judicially construed in accordance with these views. They were copied literally from a statute of Pennsylvania (Laws of 1879, p. 114, Sec. 4) and have long existed there in the same substantial form (Laws of 1844, p. 498, Sec. 33; 1859, p. 529; 1868, p. 109, Sec. 4). It is well settled there that they impose a tax upon the property of the corporation (Westchester Co. vs. County of Chester, 30 Pa. St., 232; Lackawanna Co. vs. Luzerne County, 42 Pa. St., 424, 430; Phœnix Iron Co. vs. Commonwealth, 59 Pa. St., 104; Commonwealth vs. Pittsburg Co., 74 Pa. St., 83; Catawissa Co.'s Appeal, 78

Pa. St., 59; Coatesville Gas Co. vs. County of Chester, 97 Pa. St., 476, 481); and that "the dividend of profit earned by the "stock is but a means of ascertaining its value" (Lehigh Co. vs. Commonwealth, 55 Pa. St., 448, 451). In Commonwealth vs. Standard Oil Co., 101 Pa. St., 119, the statute discussed was identical with the one now involved (see p. 122). The trial court, after reviewing the above cases, said, "in view of this array of "authoritative decisions we cannot avoid the conclusion that the "tax in question in this case is a tax upon the tangible property of "defendant, represented by its capital stock (p. 130)." It was held that deduction must, therefore, be made for property not within the jurisdiction of the court. This the Supreme Court affirmed, saying (p. 146), "the tax in this case was in no sense a license tax." It may be again remarked that the legislature of New York, in 1885, adopted these views by enacting that the amount of capital stock which should be the basis for tax should be merely the amount employed within the state (Laws of 1885, Chap. 501, Sec. 11). The Pennsylvania statute, too, was before this court in Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, and was then regarded as imposing "a tax upon the capital" of corporations affected.

From the terms of the act and upon authority also it is manifest that this is a tax, not upon defendant's franchise but upon its capital stock at actual value. It comes precisely within the rules laid down, as above stated (*supra*, pp. 2, 3), in Bank of Commerce vs. New York (2 Black, 620), and the Bank Tax Case (2 Wall., 200). Indeed, the tax in the latter case possessed in a much greater degree than the present, the character of a tax upon franchise. For there the tax was upon the amount of the stock. Even if, by reason of losses, the capital had possessed little or no value it would equally have been taxable. But here, as has been shown, the tax depends entirely upon the actual value.

The tax, therefore, does not apply to the part of defendant's capital invested in United States bonds.

If, however, defendant be taxable upon the basis of its entire capital, including the bonds, the tax is repugnant to the Fourteenth Amendment of the Constitution of the United States.

It is provided by the Fourteenth Amendment (Sec. 1) that no "state shall deprive any person of life, liberty or property without "due process of law, nor deny to any person within its jurisdiction "the equal protection of the laws." And the defendant is a person within the meaning of this provision (County of Santa Clara vs. Southern Pacific Company, 118 U. S., 394; County of San Mateo vs. Southern Pacific Company, 13 Fed. Rep., 722, 747, 748, 762).

Inequality of taxation is such a denial of equal protection. This was ruled in Strauder vs. West Virginia (100 U. S., 303). The court, speaking of the act of congress providing that "all persons within "the jurisdiction of the United States in every state and territory "shall be subject to like * * *taxes, licenses* and exactions of every "kind as white citizens and no other" (R. S., Sec. 1977), said "this act "puts in the form of a statute what had been substantially ordained "by the constitutional amendment." That is to say unequal taxes or licenses are prohibited thereby. So, too, in the case of County of San Mateo vs. Southern Pacific Company (8 Sawyer, 238; 13 Fed. Rep., 722). The constitution of California provided that, except as to "railroad and other *quasi* public corporations," in assessing property for taxation mortgages should be deducted; but that, in the case of railroads operated in more than one county, there should be no such deduction. The court, (FIELD and SAWYER, JJ.), held that a corporation is entitled, under the amendment, to the equal protection of the laws; that this implies that it is exempt from any greater burdens or charges by way of taxation than such as are equally imposed upon all others under like circumstances; that uniformity of taxation requires uniformity in the mode of assessment, as well as in the rate of percentage charged, and that, in the different modes prescribed by the constitution of assessing the value of the property of natural persons and of railroad corporations as the basis of taxation, there was a departure from the rule of equality and uniformity. The precise principles now involved were there laid down with such distinctness and maturity of consideration as to make it proper to here repeat considerable extracts from the language used:

" Unequal exactions in every form or under any pretense " are absolutely forbidden, and of course unequal taxation, for " it is in that form that oppressive burdens are usually laid. It " is not possible to conceive of equal protection under any " system of laws where arbitrary and unequal taxation is per- " missible ; where different persons may be taxed on their prop- " erty of the same kind, similarly situated, at different rates ; " where, for instance, one may be taxed at one per cent on the " value of his property, another at two or five per cent, or " where one may be thus taxed according to his color, because " he is white, or black, or brown, or yellow, or according to any " other rule than that of a fixed rate proportionate to the value " of his property (8 Sawyer, 251, 252).

" In the constitution of several states a provision is found re- " quiring ' equality and uniformity ' in the taxation of property, " and this is held to mean that taxes must be levied according " to some fixed rate or rule of apportionment, so that all per- " sons shall pay the like amount upon similar kinds of property " of the same value. * * What is called for under a con- " stitutional provision requiring equality and uniformity in the " taxation of property must be equally called for by the Four- " teenth Amendment. The forced contribution from one which " would follow taxation of his property without reference to a " common ratio, would be inconsistent with that equal protection " which the amendment requires the state to extend to every per- " son within its jurisdiction (*Id.*, 252). * * As the foundation " of all just and equitable taxation is the assessment of the " property taxed—that is, the ascertainment of its value in " order that the tax may be levied according to some ratio to " the value—uniformity of taxation necessarily requires uniform- " ity in the mode of assessment, as well as in the rate of taxa- " tion ; or, to quote the language of the Supreme Court of Ohio " expressing the same thought, " uniformity in taxing implies " equality in the burden of taxation, and this equality of burden " cannot exist without uniformity in the mode of assessment as " well as in the rate of taxation.' (Exchange Bank of Columbus " vs. Hines, 3 Ohio St. Rep., 1) " (*Id.*, 254).

In that case, then, it is distinctly held that inequality of taxation exists when, by reason of deductions allowed in one case and not in another, there are different modes of assessment upon similar property. And this court, too, has so held.

In People vs. Weaver, 100 U. S., 539, a statute of the state permitted taxpayers to deduct the amount of their debts from the valuation of their personal property save in the case of national bank shares, when no such deduction was permitted. It was held that this violated the requirement of the national bank act that bank shares should not be taxed at a greater rate than

other moneyed capital. To the same effect are Supervisors vs. Stanley, 105 U. S., 305; Evansville Bank vs. Britton, 105 U.S., 322; County of Santa Clara vs. Southern Pacific Company, 18 Fed, Rep., 385, 398.

The present application of these principles is manifest. The tax upon corporations declaring less than six per cent, as has been seen, is a tax upon their property, and they are entitled to deduct from the assessment the amount of their United States bonds. This is incontrovertible (Bank Tax Case, 2 Wallace, 200). Unless, then, those declaring over six per cent are allowed the same deduction—are relieved from taxation to the extent of their United States bonds—the tax is unequal and, therefore, unconstitutional.

It is suggested that the legislature has power to classify corporations for purposes of taxation (p. 22). No doubt it may divide them into as many classes as the different pursuits followed by them may require (Railroad Tax Cases, 92 U. S., 575). But there can be no classification by arbitrary rules among those engaged in the same business, in the same locality. There can be no subdivisions merely according to wealth or prosperity. This does not satisfy the requirement of uniformity. These rules are well established.

This point was fully decided in San Mateo County vs. Southern Pacific Company (*supra*). The court there said: "it is no "answer to this discrimination to say that property in the state "may be divided into classes, and different rates prescribed for "them. Undoubtedly property may be classified for purposes of "taxation. Real property may be subjected to one rate of tax-"ation, personal property to another rate. Property in partic-"ular districts may be taxed for local purposes, whilst property "elsewhere may be exempt. Taxation on business in the form "of licenses may also vary according to the calling or occupa-"tion licensed and the extent of business transacted; but even "then there must be uniformity of charges with respect to the "same calling or occupation in the same locality (FIELD, J., 8 Saw-"yer, 256). The ground of complaint here is that the law requires a "higher value to be placed upon the defendant's property than "upon the property of individuals similarly encumbered, or rather "requires the assessor of the defendant's property, in estimat-"ing its value, to disregard and set aside certain elements ma-"terially affecting its amount, which are to be considered in esti-"mating the value of the property of individuals. It is not "classifying property to make this distinction in determining its "value. It is not classifying property to provide that the prop-"erty of certain parties, which has a mortgage upon it, shall be "assessed at its value after deducting the mortgage, and that

"the property of other parties, also having a mortgage upon it, "shall be taxed at its full value, without any deduction. That "is not providing for a different rate of taxation for different "kinds of property, but for unequal taxation according to the "character of the owner (FIELD, J., *Id.*, 257).

"Classification should have reference to the different char- "acter, situation and circumstances of the property, making a "different form or mode of taxation proper, if not absolutely "necessary. It cannot be arbitrarily made with mere reference "to the nationality, color or character of the two owners, "whether natural or artificial persons, without any reference to "a difference in the character, situation, or circumstances of "the property. If the arbitrary discrimination and classifica- "tion found in this case can be legally made under the consti- "tution and the law of the land, then the constitution, or the "law, can be so framed as to dispose of a man's rights in prop- "erty of all kinds by arbitrary classification and definition with- "out regard to the real facts, circumstances, or condition of the "property. A person may be classified and defined out of the "equal protection of the law; and if so with reference to this "provision, he can also be classified and defined out of uni- "formity in the operation of the law in other particulars; out "of the protection of due process of law, and of the provision "forbidding a law impairing the obligation of contracts, or "taking property for public use without just compensation; "and, indeed, out of all the guarantees of the constitution, "state or national (SAWYER, J., *Id.*, 307).

To the same effect are—

Gilman vs. Sheboygan, 2 Black, 510.
Albany City Bank vs. Maher, 9 Fed. Rep., 884.
County of Santa Clara vs. Southern Pacific Co., 18 Fed. Rep., 385, 396, 409, 439.
Dundee Co. vs. School Dist., 19 Fed. Rep., 359.
Oliver vs. Washington Mills, 11 Allen, 283, 288.
Stuart vs. Palmer, 74 N. Y., 183, 189.
State vs. Township, 36 New Jersey L., 66, 70.
City vs. McQuillan, 9 Dana, 513.
Howell vs. Bristol, 8 Bush, 493, 498.
Attorney-General vs. Winnebago, 11 Wis., 35, 42.
City of New Orleans vs. Home Ins. Co., 23 La. Ann., 449.
In re Ah Fong, 3 Sawyer, 144, 145.
Ah Kow vs. Nunan, 5 Sawyer, 552.
Parrott's Case, 6 Sawyer, 349.
Louisville & N. R. Co. vs. Railroad Comm., 19 Fed. Rep., 679.

Upon principle the rule in regard to uniformity of taxation upon franchises must be the same as in regard to taxes upon any other property. There can be no more reason why arbitrary distinctions should be made between persons owning that species of property

than between the owners of property of any other kind. And it is so held.

County of San Mateo vs. Southern Pacific Co., 8 Sawyer, 256.
Portland Bank vs. Apthorp, 12 Mass., 252, 258.
Commonwealth vs. People's Savings Bank, 5 Allen, 428, 431.
Oliver vs. Washington Mills, 11 Allen, 268.
Parish vs. Cochran, 20 La. Ann., 373.
State vs. Merchants' Ins. Co., 12 La. Ann., 802.
City of East St. Louis vs. Wehrung, 46 Ill., 392.

If, then, the tax upon this defendant be a tax upon franchise, the statute is unconstitutional. For it subjects defendant to assessment and taxation upon its franchises at a higher rate than that imposed upon others in precisely the same situation. It, therefore, denies to defendant equal protection of the laws.

The Judgment should be Reversed.

While the legislature has seen fit to describe the tax as a tax upon corporate franchise or business, examination shows it to be, in fact, a tax upon defendant's capital stock at its actual value. Defendant is, therefore, entitled to deduct its United States bonds. But if defendant is not entitled to such deduction the statute is unconstitutional. For other similar corporations are entitled thereto and the act, therefore, contravenes the rule that no state shall deny to any person the equal protection of the laws.

If this tax be upheld, the exemption from state taxation of United States bonds in the hands of corporations, is practically gone. Adopting the form of this statute and calling the tax a tax upon franchise or business, any state may impose a tax to be computed upon the capital at whatsoever rate it sees fit. For "it must always be remembered that, if the right to impose a tax at all exists, it is a right which in its nature acknowledges no limits" (Bank of Commerce vs. New York, 2 Black, 620). And such tax must be paid, although all the capital be invested in United States bonds. Surely this court will not suffer the great principle of public policy that the states have no power, by "taxation or otherwise, to retard, impede, "burden or in any manner control the operations of the national "government" (McCulloch vs. Maryland, 4 Wheaton, 316, 436; Lane County vs. Oregon, 7 Wall., 71, 77), to be thus lightly frittered away.

B. H. Bristow,
David Willcox,
Of Counsel for Plaintiff in Error.

STATUTES OF NEW YORK.

LAWS OF 1880, CHAP. 542.

AN ACT to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations.

Passed June 1, 1880; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Hereafter, it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its capital stock, as provided in section three of this act, to make report in writing to the comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock, during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November in each year, in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, not less, however, than the average price which said stock sold for during said year; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same; provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized

and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the estate thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled may within ten days appeal therefrom to the board of equalization, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the State treasurer.

§ 2. If the said officers of any such corporation, joint-stock company or association shall neglect or refuse to furnish the comptroller, on or before the fifteenth day of November of each and every year, with the report aforesaid, or the certificate of appraisement, and oath or affirmation, as the case may be, as required by the first section of this act, it shall be the duty of the comptroller of the State to add ten per centum to the tax of said corporation for each and every year for which such report or certificate of appraisement and oath or affirmation were not so furnished, which percentage shall be assessed and collected with the said tax in the usual manner of assessing and collecting such taxes; provided, that if said officers of any such corporation, joint-stock company or association shall intentionally fail to comply with the provisions of the first section of this act for two successive years, the comptroller shall report the fact to the governor, who, if he shall be made satisfied that such failure was intentional, shall thereupon direct the attorney-general to to take proceedings, in the name of the people of this State, to declare the charter of said corporation, joint-stock company or association forfeited, and its chartered privileges at an end; and for such intentional failure, the charter, chartered privileges, corporate rights and franchises of every such corporation, joint-stock company or association shall cease, end, and be determined.

§ 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State, shall be subject to and pay a tax into the treasury of the State annually, to be computed as follows: If the dividend or dividends, made or declared by such corporation, joint-stock

company or association, during any year ending with the first Monday in November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividend so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of valuation, made also in accordance with the provisions of the first section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum.

§ 4. It shall be the duty of the treasurer or other officer, having charge of any corporation, joint-stock company or association, upon which a tax is imposed by either of the preceding sections of this act, to transmit the amount of said tax to the treasury of the State within fifteen days from the first day of January in each and every year.

§ 5. Hereafter it shall be the duty of the president, secretary, or other proper officer of each and every insurance company or association incorporated by or under any law of this State, except life insurance companies, and purely mutual beneficial associations, whose fund for the benefit of members, their families, or heirs, is made up entirely of contributions of their members, and the accumulated interest thereon, to make report in writing to the comptroller semi-annually upon the first days of August and February in each year

setting forth the entire amount of premiums received on business done in this State by such company or association during the six months ending the preceding first days of July and January, whether the said premiums were received in money or in the form of notes, credits, or any other substitute for money, and every such corporation or association shall pay into the State treasury at the dates aforesaid a tax of eight-tenths of one per centum upon the gross amount of said premium; provided, that said report shall be made under oath or affirmation, and that it shall be the duty of the comptroller of the State to add ten per centum to the account of any company or association whose officers shall neglect or refuse for a period of thirty days to make the said report, or to pay into the State treasury the tax imposed by this section. Every fire or marine insurance company organized under the laws of any other State or country, and doing business in this State, and every person, partnership, corporation, or company doing a fire or marine insurance business in this State, shall pay into the treasury on the first day of February and August in each year, a tax of eight-tenths of one per centum on their gross premiums received by them on business transacted in this State during the six months preceding the first day of January and July. And every such company, person, partnership, or corporation, or the agents and officers thereof in this State shall make report in writing to the comptroller semi-annually, upon the first day of February and August in each year, setting forth the entire amount of premiums received.

§ 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated by or under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other State, and doing business in this State, and every express company, palace car or sleeping car company, incorporated or unincorporated, doing business in this State, shall pay to the State

treasurer for the use of the State a tax of five-tenths of one par centum upon the gross earnings in this State of said corporation or company, for tolls, transportation, telegraph or express business transacted in this State, and in arriving at the gross earnings of any express, palace car or sleeping car company, or freight line, there shall be first deducted the expenses paid to any common carrier for transportation upon such business within this State. Nothing in this section contained shall be held to apply to any street surface railroad company.

§ 7. The tax imposed under section six of this act shall be paid semi-annually, upon the first days of February and August of each year, the first payment to be made on the first day of August, A. D. eighteen hundred and eighty, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of the corporations, joint-stock companies or associations therein referred to, to transmit to the comptroller a statement, under oath or affirmation, of the amount of the gross receipts of the said associations, corporations or joint-stock companies derived from all sources during the preceding six months, and if any such corporation, joint-stock company or association shall neglect or refuse, for a period of thirty days after such tax becomes due, to make returns or to pay the same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the use of the State as other taxes are recoverable by law, from such corporation, joint-stock company or association.

§ 8. The lands and real estate of the various corporations, joint-stock companies and associations mentioned in this act shall continue to be assessed and taxed where situated, but the capital stock and personal property of said corporations, joint-stock companies and associations shall hereafter be exempt from assessment or taxation, except as in this act prescribed, and no tax on gross reseipts, except as in this statute authorized, shall be imposed or charged against any street horse-railroad company.

§ 9. The taxes imposed by this act, and the revenue derived therefrom shall be applicable to the payment of the ordinary and current expenses of the State, and if any corporation, joint-stock company or association shall neglect or refuse to pay any tax by this act required to be paid, the same may be sued for in the name of the people of the State, and recovered in any court of competent jurisdiction, in an action to be brought by the attorney-general at the instance of the comptroller.

§ 10. This act shall take effect immediately.

LAWS OF 1881, CHAPTER 361.

AN ACT to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled "An Act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations."

Passed May 26th, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled "An act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations," is hereby amended so as to read as follows:

§ 1. Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, as provided in section three of this act, to make report in writing to the comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corparations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November, in each year, in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in

cash, not less, however, than the average price which said stock sold for during said year; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same; provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the State thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled, may within ten days appeal therefrom to a board consisting of the secretary of state, attorney-general and state treasurer, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the state treasurer.

§ 2. If the said officers of any such corporation, joint-stock company or association shall neglect or refuse to furnish the comptroller, on or before the fifteenth day of November of each and every year, with the report aforesaid, or the certificate of appraisement, and oath or affirmation, as the case may be, as required by the first section of this act, or to pay the tax imposed on such corporation, company or association within fifteen days after the first of January as provided in the fourth section of this act, it shall be the duty of the comptroller of the state to add ten per centum to the tax of said corporation, company or association, for each and every year for which such report or certificate of appraisement and oath or affirmation were not so furnished, or for which such tax shall not have been paid, which percentage shall be assessed and collected with the said tax in the usual manner of assessing and collecting such taxes; provided, that if said officers of any such corporation, joint-stock company or association shall intentionally fail to comply with the provisions of the first or fourth section of this act for one year, the comptroller shall report the fact to the governor, who, if he shall be made satisfied that such failure was intentional, shall thereupon direct the attorney-general to take proceedings, in the name of the people of this State, to declare the charter or privileges of said corporation, joint-stock company or association forfeited, and at an

end; and for such intentional failure duly found, the charter and privileges of every such corporation, company or association shall cease, end, and be determined.

§ 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country and doing business in this state, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this state, which exception shall not be taken to include gas companies or trust companies, shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the state annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association, during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared; or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum.

§ 4. It shall be the duty of the treasurer or other officer having charge of any corporation, joint-stock company or association, upon which a tax is imposed by either of the preceding sections of this act to transmit the amount of said tax to the treasury of the state within fifteen days after the first day of January in each and every year.

§ 5. Hereafter it shall be the duty of the president, secretary, or other proper officer of every insurance company and every association organized or incorporated by or under any law of this state, and of every person or partnership doing an insurance business in this state (except life insurance companies, and purely mutual beneficial associations, whose fund for the benefit of members, their families, or heirs, is made up entirely of contributions of their members, and the accumulated interest thereon), to make report in writing to the comptroller annually upon the first day of August in each year, after the first day of August, eighteen hundred and eighty-one, setting forth the entire amount of premiums received on business done in this state by such company or association, person or partnership during the year ending with the preceding thirtieth day of June, whether the said premiums were in money or in the form of notes, credits, or any substitute for money, and every such company, association, person or partnership shall pay into the state treasury, at the date aforesaid, a tax, as a tax on its corporate franchise or business, at the rate of eight-tenths of one per centum upon the gross amount of said premiums. And every company or association organized under the laws of any other state or country, and every person or partnership doing an insurance business in this state, except as aforesaid, shall pay into the treasury on the first day of August in each year a tax at the rate of eight-tenths of one per centum on their gross premiums received by them on business transacted in this state during the year ending with the preceding thirtieth day of June, whether the said premiums were in money or in the form of notes, credits, or any other substitute for money. And every such company, association, person, partnership, or the agents and officers thereof, in this state shall make report in writing to the comptroller annually upon the first day of August in each year, setting forth the entire amount of premiums received during the period aforesaid. Provided, that the reports above required shall be made under oath or affirmation, and that it shall be the duty of the comptroller of the state to add ten per centum to the account of any company, association, person, or partnership, which shall neglect or refuse for a period of thirty days to make the said report, or

to pay into the state treasury the tax imposed by this section. And it shall also be the duty of the president, secretary, or other proper officer of each and every insurance company, association, partnership, and of every person liable to be taxed under this section, to make a report in writing to the comptroller on the first day of August, eighteen hundred and eighty-one, under oath or affirmation, of the entire amount of premiums received on business done in this state during the six months ending with the preceding thirtieth day of June, and to pay a tax at the rate of eight-tenths of one per centum thereon. And it shall be the duty of the comptroller of the state to add ten per centum to the account of any company, association, person or partnership, which shall neglect or refuse for a period of thirty days to make the said report, or to pay into the state treasury the tax imposed.

§ 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated or organized by or under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country and doing business in this state, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other state, and doing business in this state, and every express company or association, palace-car or sleeping-car company or association incorporated or unincorporated, doing business in this state, shall pay to the state treasurer for the use of the state, as a tax upon its corporate franchise or business in this state, a tax, at the rate of five-tenths of one per centum upon the gross earnings in this state of said corporation or company or association, for tolls, transportation, telegraph, telephone or express business transacted in this state.

§ 7. The tax imposed under section six of this act shall, after the first day of August, eighteen hundred and eighty-one, be paid annually on the first day of August of each year. It shall be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of

this act to transmit to the comptroller on the first day of August in each year a statement, under oath or affirmation of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the year ending with the preceding thirtieth day of June, together with the amount of tax imposed thereon by section six. And it shall also be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of this act, to transmit to the comptroller on the first day of August, eighteen hundred and eighty-one, a statement under oath or affirmation of the amount of the gross earnings of the said associations, corporations or joint-stock companies derived from all sources during the six months ending with the thirtieth day of June, eighteen hundred and eighty-one, together with the tax imposed thereon by section six of this act. And if any such corporation, joint-stock company or association shall neglect or refuse, for a period of thirty days after any tax imposed by sections six or seven of this act becomes due, to make returns or to pay the same, the amount thereof, with the addition of ten per centum thereto, shall be collected, for the use of the state as other taxes are recoverable by law from such corporation, joint-stock company or association.

§ 8. The corporations, joint-stock companies and associations mentioned in this act as taxable shall hereafter be exempt from assessment and taxation for state purposes, except upon their real estate and as herein provided; but they shall in all other respects be liable to assessment and taxation as heretofore.

§ 9. The taxes imposed by this act, and the revenue derived therefrom, shall be applicable to the payment of the ordinary and current expenses of the state, and if any corporation, joint-stock company, person, partnership or association shall neglect or refuse to pay any tax by this act required to be paid, the same may be sued for in the name of the people of the state, and recovered in any court of competent jurisdiction, in an action to be brought by the attorney-general at the instance of the comptroller.

§ 10. All obligations, liabilities and taxes heretofore incurred or imposed under said act, chapter five hundred and forty-two of laws of eighteen hundred and eighty, are saved, and shall be enforced as if the said act had not been hereby amended.

§ 2. This act shall take effect immediately.

LAWS OF 1882, CHAP. 151.

AN ACT to amend chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled "An act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the State upon certain corporations, joint stock companies and associations.'"

Passed May 12, 1882; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled "An act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint stock companies and associations,'" is hereby amended by adding thereto, three additional sections to be called sections eleven, twelve and thirteen, to read as follows:

§ 11. Whenever the comptroller is dissatisfied with the report of any association, corporation or joint-stock company, liable to tax under any of the provisions of this act, whose capital is only partially employed within this state, he is authorized and empowered to fix and determine the amount of capital stock which in his judgment shall be the basis for tax under the provisions of this act, and to settle and account for the taxes, penalties and interest due the state thereon, and any association, corporation or joint-stock company dissatisfied with the account so settled may within ten days after notice thereof appeal therefrom to a board consisting of the secretary of state, attorney-general and state treasurer, which board on such appeal shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final, but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account as settled by the comptroller, be deposited with the state treasurer.

§ 12. Whenever any association, corporation or joint-stock company liable to make reports to the comptroller under any of the provisions of this act shall neglect or refuse to make such report or reports within the time prescribed in this act, the comptroller is authorized to examine, or cause to be examined, the books and

records of any such association, corporation or joint-stock association, and fix and determine the amount of tax due in pursuance of the provisions of this act, and in case of the non-payment of the amount of tax so ascertained to be due, together with the expenses of such examination for a period of thirty days after notice to any association, corporation or joint-stock company so in default, the same may be sued for in the name of the people of the state, and recovered in the same manner provided in section nine of this act.

§ 13. The comptroller is authorized to issue subpœnas requiring the attendance before him of any officer, agent, clerk or employee of any association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, capital or dividends under any of the provisions of this act, and to administer oaths to and examine them or any one or more of them on oath in relation to any matter which may in any way be material in determining the amount of the tax to be paid by any such association, corporation or joint-stock company ; it shall be the duty of the person or persons thus subpœnaed to attend as thereby required and give testimony on the subject aforesaid, and in case of failure to so attend or testify, the person so failing shall be guilty of a contempt, and any special term of the Supreme Court may adjudge and determine the punishment therefore in the same manner and to the same extent as provided in the Code of Civil Procedure for the punishment of contempt of court other than criminal contempt.

§ 2. This act shall take effect immediately.

LAWS OF 1885, CHAP. 501.

AN ACT to amend chapter one hundred and fifty-one of the laws of eighteen hundred and eighty-two, entitled "An act to amend chapter three hundred and sixty-one, of the laws of eighteen hundred and eighty-one, entitled 'An act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations.'"

Passed, June 13, 1885; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter one hundred and fifty-one of the laws of eighteen hundred and eighty-two, entitled "An act to amend chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled an act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations,'" is hereby amended so as to read as follows:

§ 1. Chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled "An act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations,'" is hereby amended by adding thereto nine additional sections, to be called sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen, to read as follows:

§ 11. The amount of capital stock which shall be the basis for tax under the provisions of section three of this act, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this state. In making to the comptroller the report in writing or certificate of estimate and appraisal of the capital stock of such corporation, joint-stock company or association provided for by the first section of this act, it shall be the duty of the president or treasurer thereof, as the case may be, to state specifically the amount of capital stock employed within this state, of such corporation, joint-stock company or association. Whenever the comptroller is dissatisfied

with such report or certificate of estimate and appraisal, as the case may be, of any corporation, joint-stock company or association whose capital is only partially employed within this state, he is authorized and empowered to ascertain, fix and determine the amount of capital employed within this state, and to settle an account for the taxes and penalties due the state thereon.

§ 12. Whenever any corporation, joint-stock company or association liable to make reports or certificates of estimate and appraisal to the comptroller, under any of the provisions of this act, shall neglect or refuse to make such report or reports within the time prescribed in this act, or shall make such report or certificate as shall be unsatisfactory to the comptroller, the comptroller is authorized to examine, or cause to be examined, the books and records of any such corporation, joint-stock company or association, and to fix and determine the amount of tax and penalty due in pursuance of the provisions of this act, either from the said books and records, or from any other data in his possession which shall be satisfactory to him, and to settle an account for said tax and penalty, together with the expenses of such examination, against said corporation, joint-stock company or association.

§ 13. Whenever the comptroller shall deem it necessary or important to examine any person as a witness upon any subject or matter relating to the amount of capital stock of such corporation, or to use, examine or inspect any book, account, voucher or document in possession of any officer of such corporation, or other person, or under his control, relating to such capital stock and tax, he shall have the power to issue a subpœna in proper form, commanding such person or officer to appear before him or some person designated as commissioner by him by an appointment in writing, filed in the office of such comptroller, at a time and at the place where the principal office of such corporation is situated within this state in such subpœna specified, to be examined as a witness, and such subpœna may contain a clause requiring such person or officer to produce on such examination all books, papers and documents in his possession or under his control, relating to the capital stock of such corporation and the amount thereof employed within this state. Such subpœna shall be served upon the person named by showing him the original subpœna and delivering to and leaving with him at the same time a copy thereof. The comptroller or the commissioner so pesignated by him as aforesaid may administer oaths to such persons as he may desire to examine, so brought before him by sub-

pœna or otherwise, and examine them on oath in relation to any matter which may in any wise be material in determining the amount of the tax to be paid by any such corporation, joint-stock company or association as aforesaid. Whenever any person duly subpœnaed to appear and give evidence as aforesaid, or to produce any books and papers as hereinbefore provided, shall neglect or refuse to appear or to produce such books and papers according to the exigency of such subpœna, or shall refuse to testify before said comptroller or the commissioner so designated by him, or to answer any proper and pertinent question, he shall be deemed in contempt, and thereupon any justice of the supreme court of the judicial district within which the principal office of such corporation within this state is situated shall, upon the motion of the comptroller, based upon affidavit showing the commission of the offence, either, first, make an order requiring the accused to show cause before him, at a time and place specified therein, why the accused should not be punished for the alleged offence ; or, second, issue a warrant of attachment directed to the sheriff of a particular county, or generally directed to the sheriff of any county where the man may be found, commanding him to bring him before said justice either forthwith or at a time and place therein specified, to answer for the alleged offense. On the return of said attachment and the production of the body of the defendant therein the said justice shall have jurisdiction in the matter, and the person charged may purge himself of the contempt in the same way, and the same proceedings shall be had, and the same penalties may be imposed and the same punishments inflicted as in the case of a witness subpœnaed to appear and give evidence as is prescribed in title three, chapter seventeen of the Code of Civil Procedure, in proceedings to punish a contempt of court other than a criminal contempt.

§ 14. The comptroller is hereby authorized and directed, upon application to him made by any corporation, joint-stock company or association, to make, settle and adjust all accounts against such corporation, joint-stock company or association, for all taxes and penalties arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, by taking as a basis for taxation the capital employed within the state by such corporation, joint-stock company or association. Provided, however, that such corporation, joint-stock company or association shall not be entitled to the benefit of a settlement upon such basis unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled, before the first day

of August, eighteen hundred and eighty-five, nor shall this section apply to the case of any tax for which suit shall have been heretofore brought by the attorney-general, in which suit the trial has been commenced, or in which judgment shall have been entered heretofore for the people for the amount of said tax. Any corporation, joint-stock company or association whose capital has heretofore been only partially employed within this state, and which is now liable for taxes arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, and which are still due and unpaid, may, at any time prior to the first day of August, eighteen hundred and eighty-five, pay to the state treasurer, for the use of the state, in full discharge of the same, such sum of money as shall be fixed by the comptroller as the tax due for the said period by the said corporation, joint-stock compauy or association, upon the basis of the capital employed within the state. Provided, that this section shall not apply to the case of any tax for which suit may have heretofore been brought by the attorney-general, and for which judgment shall have been entered therein, or if in such suit trial has been commenced.

§ 15. All accounts hereafter settled by the comptroller agreeably to the provisions of this act shall bear interest from a date thirty days after the sending of notice of settlement, hereinafter provided for, until full payment thereof shall be made.

§ 16. It shall be the duty of the comptroller after making with any partnership, corporation, joint-stock company or association liable to taxation under any of the provisions of this act, the settlement of such taxes, to forthwith send notice hereof, in writing, to such person, partnership, corporation, joint-stock company or association, which notice may be sent by mail to the post-office address of such corporation, joint-stock company or association.

§ 17. No writ of certiorari to review the determination and settlement of the comptroller as to the amount of capital used within the state by any corporation, joint-stock company or association, and as to the tax and penalty to be paid thereon, shall be granted, except application therefor be made within thirty days after service upon such corporation, joint-stock company or association by the comptroller of notice of such settlement. Nor shall any such writ be granted except the papers upon which motion therefor is to be made, including notice of motion, shall have been served upon the comptroller at least eight days before such motion, nor unless the corporation, joint-stock company or association applying for such

writ shall, before making such motion, have deposited with the state treasurer the full amount of taxes, penalties and charges so settled and adjusted by the comptroller, and filed with him an undertaking in such amount, and with such sufficient sureties as shall be approved by one of the justices of the supreme court of this state, to the effect that if said writ be vacated and the determination of the comptroller sustained, the applicant for the writ will make payment of all costs and charges which may accrue against such applicant in the prosecution of such writ, including costs on all appeals.

§ 18. After the expiration of thirty days from the service by the comptroller of notice of the settlement aforesaid, if no proceedings shall have been taken to review the same, as provided by this act, or if the deposit with the state treasurer of the amount of the said settlement, together with the undertaking, as provided for by this act, shall not then have been made, it shall be lawful for the comptroller to issue his warrant or warrants under his hand and seal of office directed to the sheriff of any county in this state, commanding him to levy upon and sell the goods and chattels, lands and tenements of the said corporation, joint-stock company or association found within the said county, for the payment of the amount of said settlement, together with interest thereon and costs of executing such warrant, and to return the said warrant to the comptroller, and pay to the state treasurer the money which shall be collected by virtue thereof, by a certain time therein to be specified, not less than sixty days from the date of such warrant. Such warrant shall be a lien upon and shall bind the personal estate of the person, partnership, corporation, joint-stock company or association against whom it shall be issued, from the time an actual levy shall be made by virtue thereof, and the sheriff to whom such warrant shall be directed shall proceed upon the same in all respects with the like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments rendered by a court of record, and shall be entitled to the same fees and costs for his services in executing the same, to be collected in the same manner.

§ 19. This act shall take effect immediately.

October Term, 1886. No. 14.

SUPREME COURT OF THE UNITED STATES,

ERROR TO THE SUPREME COURT OF NEW YORK.

THE HOME INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Defendants in Error.

PETITION FOR RE-HEARING,

On behalf of Plaintiff in Error.

B. H. BRISTOW,

Counsel,

20 NASSAU STREET, N. Y.

BURGOYNE'S "QUICK PRINT," 146-150 CENTRE ST., N. Y.

This petition was granted & case
re heard & decided on 20 th Oct Term 1889.

Supreme Court of the United States.

ERROR TO THE SUPREME COURT OF NEW YORK.

THE HOME INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

Petition for Rehearing.

Counsel for the plaintiff in error respectfully asks the Court that this case may be reheard and a reargument ordered.

The Court will remember that the judgment of the Supreme Court of the State of New York was affirmed by a divided Court, and, therefore, no opinion was delivered. The case involves a question arising under the Constitution of the United States, viz., whether the Legislature of New York has power to impose a tax on so much of the capital of a corporation as is invested in United States stocks, by calling it a franchise tax.

This Court having been established by the Constitution and the judicial power extended to all cases in law and equity arising under the Constitution and laws of the United States, must be the ultimate tribunal for the determination of such questions. As was shown on the

brief of counsel for the plaintiff in error, the act of the New York Legislature in question was copied literally from a statute of Pennsylvania which had long existed there. By the well-settled construction of the statute by the courts of that State the tax so imposed was held to be a tax upon the property of the corporation From this it would follow that so much of the capital of a corporation as is invested in United States stocks should be exempt from the operation of the tax. The Courts of New York have given the act a different construction, holding that it imposes a franchise tax, and, therefore, the capital invested in United States stocks is not exempt from the operation of the act. Thus the same act has a different effect and operation in different States. Since the question involved is one arising under the Constitution and laws of the United States there can be no authoritative decision of equal and general application except by this Court.

In Briscoe vs. Commonwealth Bank, 8 Peters, 118, and City of New York vs. Milne, 8 Peters, 120, the Chief-Justice announced the following rule :

> " The practice of this Court is, not (except in
> " cases of absolute necessity) to deliver any judgment
> " in cases where constitutional questions are in-
> " volved, unless four Judges concur in opinion,
> " thus making the decision that of a majority of
> " the whole Court. In the present cases four
> " Judges do not concur in opinion as to the con-
> " stitutional questions which have been argued.
> " The Court therefore direct these cases to be re-
> " argued at the next Term, under the expectation
> " that a larger number of the Judges may then be
> " present."

The same cases were again called at the next Term of the Court, and the Chief-Justice said : " The Court " cannot know whether there will be a full Court dur-

" the Term ; but as the Court is now composed, the " constitutionl cases will not be taken up " (9 Peters, 85).

In a note to that case it is stated that during that Term the Court was composed of six Justices [the full Court at the time being seven], the vacancy occasioned by the resignation of Mr. Justice DUVAL not having been filled.

It thus appears that this Court early in its history adopted and adhered to a practice which required constitutional questions to be heard by a full Court.

The importance of the question in this case sufficiently appears from the briefs on file. The division of the Court upon the question so presented sufficiently establishes the difficulty of the question.

It is to be remembered that the Act of New York, passed June 15, 1886 (Laws of New York, 1886, Chap. 679), changing the mode of taxation of certain corporations, does not modify or repeal the act in question, except as to insurance companies, but leaves the Act of 1880, as amended by the Act of 1881, to stand in respect of all other corporations subject to its provisions.

B. H. BRISTOW,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
SEP 29 1888
JAMES. H. McKENNEY,
CLERK.

October Term, 1888. No. 1.

SUPREME COURT OF THE UNITED STATES,

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

THE HOME INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF UPON REHEARING

FOR PLAINTIFF IN ERROR.

B. H. BRISTOW,
DAVID WILLCOX,
Of Counsel for Plaintiff in Error.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STS., N. Y.

Supreme Court of the United States.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

THE HOME INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
AGAINST
THE PEOPLE OF THE STATE OF NEW YORK.

October Term, 1888.
No. 1.

BRIEF UPON RE-HEARING

For Plaintiff in Error.

STATEMENT.

The plaintiff in error is an insurance company of New York (p. 12). By chapter 542, section 3, of the laws of that state for 1880 (*infra*, pp. 23, 24)), there was imposed upon such corporations, among others, a tax to be computed as follows: if the dividends declared during the year did not amount to six per cent, then the tax was to be at the rate of one and a half mills upon each dollar of the actual value of the capital stock; if such dividends amounted to six per cent or more, then the tax was to be at the rate of one quarter mill upon the capital stock for each one per cent of dividend declared; and in case the corporation had common stock upon which it had paid less than six per cent and preferred stock upon which it had paid six per cent or more, then the tax was to be at the rate of one and a half mills upon each dollar of the actual value of the common stock, and one quarter mill upon the preferred stock for each one per cent of the dividend declared. By chapter 361, section 3, of the laws of 1881 (*infra*, p. 29), there was inserted in the act a definition of the tax as "a tax upon corporate franchise or business."

During the year 1881, the defendant paid dividends at the rate of more than six per cent. This brought it within the provision of the statute as amended, imposing "a tax, as a tax upon its corporate "franchise or business, to be computed as follows: * * at the "rate of one-quarter mill upon the capital stock for each one per "cent of dividend." The defendant had a large part of its capital stock invested in bonds of the United States. It claims that, for that year, it is taxable under this act only upon the part of its capital not so invested. The State, upon the other hand, claims that the defendant is taxable upon the basis of its entire capital (p. 5).

An agreed case (Code of Civil Procedure, Sec. 1279) stating the facts was submitted by the parties to the Supreme Court of New York (pp. 4, 5). The State had judgment (p. 7). This the Court of Appeals affirmed (p. 3; 92 N. Y., 328), and final judgment upon the remittitur was entered in the Supreme Court (pp. 8, 9). To that judgment defendant sued out this writ of error upon the ground that "there was drawn in question the validity of a statute "of the State and of an authority exercised thereunder, on the ground "of their being repugnant to the constitution or laws of the United "States, and the decision was in favor of such their validity (p. 2).

The cause was argued in this court at the October Term, 1886. The judgment was affirmed by a divided court (119 U. S., 129). Thereafter a rehearing was granted and the cause restored to the docket (122 U. S., 636).

ASSIGNMENT OF ERROR.

The judgment was erroneous in holding that the defendant was liable for a tax computed upon the basis of its entire capital. It should have held that the defendant was liable only for a tax upon that part of its capital not invested in United States bonds.

BRIEF OF ARGUMENT.

No tax can be imposed upon that part of defendant's capital invested in United States bonds.

A state cannot burden the operations of the national government by taxing its bonds without its consent (McCulloch vs. Maryland, 4 Wheaton, 316, 436; Weston vs. Charleston, 2 Peters, 449; Banks vs. Mayor, 7 Wall., 16; People *ex rel.* vs. Commissioners, 90 N. Y.

63). A tax upon the capital of a corporation is a tax upon the property in which the capital is invested. No part of the capital invested in United States bonds, therefore, is taxable. This is fully established in this court.

In Bank of Commerce vs. New York (2 Black, 620), a statute of New York imposed a tax upon the capital of the bank at its actual value. Part of the capital was invested in United States bonds. It was held (NELSON, J.), that the tax did not cover the capital so invested. The reason given was that this would be a tax upon the exercise of the power of Congress "to borrow money on the credit of the United States," and that the attempted exercise of state authority in such cases would be in derogation of the powers granted to the national government within which it is supreme. "If the encroachment or usurpation to any extent is admitted," the court said, "the principle involved would carry the exercise of the "authority of the state to an indefinite limit, even to the destruction "of the power." The same thing was ruled in Bank of the Commonwealth vs. Commissioners of Taxes decided at the same term.

Again, in the Bank Tax Case (2 Wallace, 200), the New York statutes had been changed so that banks were taxable upon "a valuation equal to the amount of their capital stock paid "in or secured to be paid in, and their surplus earnings (less "ten per cent)." The capital of the bank was invested in United States bonds. The court, (NELSON, J.), said that the intent of the law-makers was plainly merely to change "the "mode of ascertaining or fixing the amount of the capital of "the banks, which is made the basis of taxation. * * "When providing for a tax on the capital at a valuation "the legislature could not but have intended a tax upon the "property in which the capital had been invested. * * "Such is the practical effect of the tax and we think it would be "doing injustice to the intelligence of the legislature to hold that "such was not their intent in the enactment of the law." It was, therefore, held that this was a tax on the property of the corporation, and did not apply to United States bonds. At the same term the court decided twenty-four other similar cases upon precisely the same grounds.

If, then, this be a tax upon capital, it is without application to the part of defendant's capital stock invested in United States bonds.

Whether or not this is a tax upon capital is to be determined, not by the form of the statute, but by its effect.

When the statute was first enacted the legislature merely imposed the tax. The following year it inserted the definition thereof "as a tax upon corporate franchise or business." But if the tax is, in its nature and effect, a tax upon capital, it is none the less so because of this amendment declaring it to be a tax upon franchise or business. The question is whether or not the tax is such as the legislature can impose. This obviously must be decided by the courts irrespective of any declaration as to the character of the tax by the legislature itself.

In Brown vs. Maryland, 12 Wheaton, 419, a state statute required all importers of foreign goods to take out a license and pay a fee. The court held that this was a regulation of commerce. It said (MARSHALL, C. J.), "but if it should be proved "that a duty on the article itself would be repugnant to the "constitution, it is still argued that this is not a tax upon the "article but on the person. The state, it is said, may tax occu- "pations, and this is nothing more. It is impossible to conceal "from ourselves that this is varying the form without varying "the substance. It is treating a prohibition which is general, "as if it were confined to a particular mode of doing the forbid- "den thing. All must perceive that a tax on the sale of an "article imported only for sale is a tax on the article itself." The same thing was ruled in Ward vs. Maryland, 12 Wall., 418; Welton vs. State, 91 U. S., 275; Webber vs. Virginia, 103 U. S., 344, and Walling vs. Michigan, 116 U. S., 446; Leloup vs. Mobile, 127 U. S., 640.

In Smith vs. Turner (Passenger Cases), 7 How., 283, a state statute provided that the health officer of the port of New York should collect from the masters of vessels a certain sum for each passenger. The moneys were to be used in supporting the Marine Hospital. Yet this was held to be a regulation of commerce.

In Henderson vs. Mayor, 92 U. S., 259, a state statute provided that the owners of steamers bringing passengers from foreign ports should give a bond for each passenger against his becoming a public charge, or, at their option, make a cash payment. It was claimed that, as the object of the provision was not taxation but protection against pauperism, it was valid as within the police power. But the court, (MILLER, J.), held otherwise. It said, "in whatever language a statute may "be framed, its purpose must be determined by its natural and "reasonable effect" (p. 268). It was apparent that the object of the statute, as judged by that criterion, was to compel the

owners of vessels to pay a sum of money for every passenger brought in, and, therefore, it was a regulation of commerce. To the same effect is Chy Lung vs. Freeman, 92 U. S., 275.

In Cook vs. Pennsylvania, 97 U. S., 566, state statutes required auctioneers to take out a license, and to collect and pay into the state treasury a percentage upon all sales of goods of foreign manufacture. It was conceded that, if this was a tax upon the goods, it was unconstitutional. But it was contended that the authority of the auctioneer to make sales was derived from the state; that the state could, therefore, impose upon him a tax for the privilege conferred, and that this was not a tax on the articles sold, but the amount of the sales made was merely the measure of the tax on the privilege. The court, (MILLER, J.), held that this tax on the privilege of selling foreign goods at auction was a tax upon the goods so sold.

In Transportation Co. vs. Parkersburg, 107 U. S., 691, a city ordinance fixed certain rates of wharfage. The suit was to enjoin proceedings at law for collection thereof. Its ground was that the ordinance was merely a subterfuge to impose a duty upon tonnage, and, therefore, unconstitutional. The court held that the intent of the ordinance was not material. Whether the charge was a charge for wharfage or a duty on tonnage must be determined by its provisions. And, upon examination, it was decided that the charge which resulted therefrom was a charge for wharfage (pp. 695, 696). In short, it was held to be quite immaterial what the legislative body intended to do. The crucial question was what it, in fact, did.

To the same effect are, Almy vs. California, 24 How., 169; Bank Tax Case, 2 Wall., 200; Cummings vs. Missouri, 4 Wall., 277, 325; Crandall vs. Nevada, 6 Wall., 35; State Freight Tax, 15 Wall., 232; Inman Co. vs. Tinker, 94 U. S., 238; Hannibal, etc., R. R. Co., vs. Husen, 95 U. S., 465; Telegraph Co. vs. Texas, 105 U. S., 460; Moran vs. New Orleans, 112 U. S., 69; Kentucky Railroad Tax Cases, 115 U. S., 321, 337; Pickard vs. Pullman Co., 117 U. S., 34; Robbins vs. Shelby Taxing District, 120 U. S., 489, 496; Fargo vs. Michigan, 121 U. S., 230, 244; Bowman vs. Railway Co., 125 U. S., 465; Pullman Co. vs. Nolan, 22 Fed. Rep., 276, 281; People vs. Allen, 42 N. Y., 404, 413; Matter of Deansville Cemetery Association, 66 N. Y., 569; In the Matter of Jacobs, 98 N. Y., 98.

Clearly, therefore, the declaration by the legislature that this is a tax on franchise or business is not controlling. "The name of this imposition is immaterial; it is the substance we are to consider" (Inman Co. vs. Tinker, 94 U. S., 238).

The statute has not the effect of imposing a tax upon franchise or business.

The modes in which the franchises of a corporation may be taxed are clearly defined. It may be done by imposing a fixed sum, or "a "graduated contribution proportioned either to the value of the privi- "leges granted, or to the extent of their exercise, or to the results of "such exercise" (State Tax on Railroad Gross Receipts, 15 Wall., 284; Delaware Railroad Tax, 18 Wall., 206, 231). These provisions of the act do not impose a fixed sum. Nor do they impose a contribution proportioned to the extent of the exercise of the franchise—to the amount of business done. That species of tax is imposed by section 5 of the same act (*infra*, pp. 24, 25). But these provisions do not refer to the amount of the business in any way. Is this then, "a contribution proportioned to the value or results of the privileges granted?"

The franchise is "the right to use the tangible property in a spe- "cial manner for purposes of gain" (State Railroad Tax Cases, 92 U. S., 575). It is itself a part of the property of the corporation, but quite distinct and separate from its tangible property (Gordon vs. Appeal Tax Court, 3 How., 133, 150; Wilmington Railroad vs. Reid, 13 Wall, 264, 265). It is a thing "capable of appraisal and ascer- "tainable by evidence, and is frequently made the subject of taxa- "tion by the sovereign power. It is a right separate and distinct "from the capital and moneyed assets of a corporation, and as to the "value of which they furnish no evidence" (Conaughty vs. Saratoga Bank, 92 N. Y., 401).

To the same effect are, Veazie Bank vs. Fenno, 8 Wall., 533, 547; Monroe Savings Bank vs. Rochester, 37 N. Y., 365, 367; Porter vs. Rockford Co., 76 Ill., 561, 578.

Its value is readily ascertained. It is determined by subtracting from the total actual value of the capital stock the total value of all items of property other than the franchise. The remainder is, of course, the value of the franchise—the value of the right to use the tangible property in a special manner for the purposes of gain.

This method has the approval of this Court (State Railroad Tax Cases, 92 U. S., 575, 602–607; see, too, Spring Valley Works vs. Schottler, 62 Cal., 69, 117; Burke vs. Badlam, 57 Cal., 594; San José Company vs. January, *Id.*, 614).

Here neither the value of this part of the property of the corporation nor the results of its use are in any way ascertained. But it is

claimed that this is a tax upon the franchise or its results, upon the ground that the tax is measured by the profits resulting from the use of the franchise—by the capacity of the company to declare dividends (p. 20).

This is clearly erroneous. The tax is a percentage upon that part of defendant's income which it has distributed in dividends—its net income or profits—without discrimination as to the source thereof. This, of course, is a tax upon the property from which the income arises (Bank of Kentucky vs. Commonwealth, 9 Bush, 46; Opinion of the Justices, 53 N. H., 634; People *ex rel.* vs. Commissioners, 90 N. Y., 63; Weston vs. Charleston, 2 Peters, 472, 475, 478; Philadelphia Co. vs. Pennsylvania, 122 U. S., 326). But the franchise is only one part of defendant's property. It is only in part the source of the dividends or net profits. They are the product of all the property. Indeed from the franchise without the other property no dividends or profits could possibly be made. This tax upon the entire amount of such dividends or profits is, therefore, a tax upon the value or result of the franchise only to the same extent and in the same manner that it is a tax upon the value or result of every other item of defendant's property including its United States bonds. And, as it includes property not taxable, it cannot be sustained as a tax on the franchise (Santa Clara County vs. Southern Pacific Co., 118 U. S., 394; California vs. Railroad Co., 127 U. S., 1).

> The suggestion made below, that this is a franchise tax because paid to the State directly and in lieu of all other State taxes, is without weight. That might be the case equally if the tax were, in terms, imposed upon capital stock. Indeed the inference properly is that this is a property tax. For it was imposed in lieu of "the customary tax laid for state purposes upon property by the general law" (p. 17).
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> That this is not a tax upon the result of the franchise, or, in other words, the business, is manifest from comparison of these provisions with the provisions imposing such a tax which are contained in section 5 of the same act. The two are totally different.

These propositions are self evident. But the State claims that this court is already committed to the view that this is a tax upon franchise. And the court below placed its decision chiefly upon this ground (pp. 18, 20, 23). The cases relied upon are as follows:

> In Society for Savings vs. Coite, 6 Wall., 594, a statute of Connecticut required savings banks to pay a tax equal to a certain percentage upon the amount of their deposits on a certain

day. It was claimed that, in so far as the deposits had been invested in United States bonds, the tax was bad. But the court (CLIFFORD, J.) upheld the tax on the ground that "reference is evidently made to the total amount of deposits "on the day named, not as the subject matter for assessment but as the basis for computing the tax required "to be paid (p. 608). Deposits are not capital stock in "any point of view, and they are not even investments "in the sense in which the word is employed in the provision. * * The assessment as required to be made "is wholly irrespective of value or of profit or loss (p. 610). "Neither investment nor the value of the deposits being "mentioned in the provision, it seems clear that they are unimportant in this investigation, as the amount of the tax is the "same whether the deposits, on the day named, have or have "not been invested, and whether they are above the par value "or of no value at all. Moneys received constitute deposits in "the sense in which the word is used in that provision, and the "total amount of such deposit on that day furnishes the true "basis of computation wholly irrespective of their market value "or of the disposition made of the funds by the defendants" (p. 611).

In Provident Institution vs. Massachusetts, 6 Wall., 611, a statute of Massachusetts imposed a similar tax upon savings banks measured by the amount of their deposits. The question as to its application to United States bonds, therefore, was identical with that involved in the last case. The court said, (CLIFFORD, J.), "deposits, as the word is employed in that section, are "the sums received by the institution from depositors without "regard to the nature of the funds. They are not capital stock "in any sense, nor are they even investments, as the word is "there used, which simply means the sums received, wholly "irrespective of the disposition made of the same or their "market value (p. 627). Valuation of property has nothing to "do with determining the amount of the tax, but the amount "depends on the average amount of the deposits (p. 630), and "it is quite obvious that there is no necessary relation between "the average amount of the deposits and the amount of the "property owned by the institution (p. 631). Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an "individual, but the amount of a franchise tax depends upon "the business transacted by the corporation and the extent to "which they have exercised the privileges granted in their "charter" (p. 632). But the court upheld the tax especially upon the ground that the local courts, as stated in the next case, had held such taxes to be taxes not upon property but upon franchise, and that this court was bound by these decisions (p. 630).

In Hamilton Co. vs. Massachusetts, 6 Wall., 632, a statute of the state required certain corporations, including the Hamilton Company, to pay a tax to the state, in lieu of all other taxation, of a percentage on the excess of the market value of their capital stock over the value of their real estate and machinery as returned by the local assessors. Its capital stock was partly invested in United States bonds. The state courts had long held that this statute, construed in connection with certain provisions of the state constitution, imposed a tax upon franchise. This court held that it was bound by this construction by the state courts of their own constitution. It stated the grounds of its decision as follows, (CLIFFORD, J.), "separated from the peculiar "provisions of the state constitution and the long practice under "the original decision, the present decision of the state court "upon the subject might well be criticised as founded in unsub- "stantial distinctions, but, when weighed as an exposition of "that peculiar clause, and, in view of the long practice of the "state commencing long before the prior decision was made, it "is not possible to withhold from the conclusion, a full and un- "qualified concurrence" (p. 640). "Such was the construction "given to the term by the supreme court of the state more than "fifty years before the present controversy arose, and the rule is "well settled in this court that the construction of the consti- "tution or statute of a state by the highest judicial tribunal of "such state, in a case not involving any question under the 25th "section of the judiciary act, is to be regarded as a part of the "provision, and that it is as binding upon the courts of the "United States as the text" (pp. 640, 641).

These cases, then, were decided upon two grounds. (1) It was held that a tax consisting of a percentage upon the deposits made with a savings bank, is a tax upon its franchise or business, and not a tax upon the property in which such deposits may be invested after they are received. (2) It was held, further, that the decision of the state court, although criticised in one of the cases as "founded in unsubstantial distinctions" (6 Wall, 640), was binding upon this court. Whatever may be thought of the soundness of this latter ground (Louisville Co. vs. Palmes, 109 U. S., 244), it has no present application. For it is not sought to sustain the present tax by any decision of the courts of the State construing the statute by which it is imposed.

The former ground, it has been claimed, controls the present case. Clearly this cannot be so. The question now involved is entirely different. There the tax was a percentage upon the deposits, "simply the sums received, wholly irrespective of the disposition made of the same" (6 Wall., 627). The liability arose by reason of the

receipt of the deposit. It was quite immaterial what became of the money after it was received, whether or how it was invested, or what profit was realized from it. Those circumstances could in no way affect the liability—they could neither increase it nor diminish it. For, of necessity, they must be preceded by the act from which sprang the matured and complete liability—the receipt of the money. That and that alone was selected by the legislature for taxation at a percentage of the amount received. The statute did not in the slightest degree contemplate or relate to anything occurring thereafter. These were precisely the considerations which led the court to hold that the tax was laid upon the franchise or business of receiving money on deposit—upon "the extent to which they, (the banks), had exercised the privileges granted by their charters" (6 Wall., 632).

But in the present case the tax is not measured by the moneys received by defendant—by the volume of its business, the extent to which it has exercised its franchise. The tax is a percentage compounded of two factors, the capital and the dividends. That is to say, it is measured by defendant's permanent investment in the business and the net profits realized from its entire property.

In the cases in 6 Wallace, then, the tax was independent of the tangible property of the corporation or any profits therefrom. Whether they existed or not the tax was fixed. The court, therefore, held that it was not a tax thereon. But here the tax depends entirely upon the amount of defendant's property and the profits therefrom. Until they are acquired there can be no tax. The tax is measured solely by their amount. So far from being similar, these modes of taxation are almost exactly the reverse of each other. In those cases the tax came before property and profits. Here property and profits must come before the tax. There the burden of the tax rested upon the franchise. But here, clearly, the ultimate burden rests upon the property of defendant invested in part in United States securities. That, therefore, is the subject of the tax (State Freight Tax Case, 15 Wall., 232).

The decision that even a tax consisting of a percentage upon all sums received by a savings bank was a tax upon franchise, was arrived at by a majority of the court, and in the face of emphatic dissent by three of the judges. That decision, therefore, should not be regarded as expressing the views of the court, save in cases identical in their facts. Much less can it be regarded as committing the court to the view that a tax upon the defendant which is a percentage

upon its capital and surplus earnings distributed as dividends, is a tax upon corporate franchise. On the contrary, the court repeated in those cases the rule laid down in the Bank Tax case that "a tax "levied under a law of the state" (enacting that corporations shall) "be liable to taxation on a valuation equal to the amount of their "capital and their surplus earnings (is) a tax on the property of the "corporation" (6 Wall., 629). These authorities, therefore, are without present application.

In any event they must be deemed to be controlled by Philadelphia and Southern Steamship Company vs. Pennsylvania, 122 U. S., 326. In that case a state statute imposed a tax upon the gross receipts of a steamship company of the state, which were derived from the transportation of persons and property by sea between different states and to and from foreign countries. The company claimed that this tax was an imposition upon interstate and foreign commerce and therefore unconstitutional. The state contended (p. 329) that it was a tax upon the franchise which it had granted to its own corporation, and relied upon the cases in 6 Wallace above stated. It was held, however, that the tax was imposed not upon the franchise but upon the commerce itself from which the receipts arose, and was, therefore, unconstitutional.

> The court said, "if, then, the commerce carried on by the "plaintiff in error in this case could not be constitutionally "taxed by the state, could the fares and freights received "for transportation in carrying on that commerce be constitu-"tionally taxed? If the state cannot tax the transportation, "may it, nevertheless, tax the fares and freight received there-"for? Where is the difference? Looking at the substance "of things, and not at mere forms, it is very difficult to see any "difference. The one thing seems to be tantamount to the "other. It would seem to be rather metaphysics than plain "logic for the state officially to say to the company, 'We will "'not tax you for the transportation you perform, but we will "'tax you for what you get for performing it.' Such a position "can hardly be said to be based on a sound method of reason-"ing" (pp. 336, 337). The tax "certainly could not have been "intended as a tax upon the corporate franchise, because, by "the terms of the act, it was laid equally on the corporations of "other States doing business in Pennsylvania. If intended as "a tax on the franchise of doing business—which in this case "is the business of transportation in carrying on interstate and "foreign commerce,—it would clearly be unconstitutional" (p. 342). To the same effect are Fargo vs. Michigan, 121 U. S., 230; Leloup vs. Port of Mobile, 127 U. S., 640.

This precisely applies here. For here, also, by the terms of this act, the tax is laid equally on the corporations of other states doing business in the state (*infra*, pp. 23, 24), and, therefore, is not a tax upon the corporate franchise. The case, too, rules that a tax upon the receipts of a corporation from any source is a tax upon the source from which the receipts arise—not upon the franchise of receiving them. This disposes of the claim that the court is committed to the view that the present is a tax upon franchise.

Neither upon principle nor authority, therefore, has the statute the effect of imposing a tax upon franchise or business.

This is, in fact, a tax upon capital at its actual value, and, therefore, does not apply to that part of defendant's capital invested in United States bonds.

The act as originally passed speaks of corporations to which it applies as "*liable to be taxed on their capital stock as provided*" therein (Laws of 1880, Ch. 542, Sec. 1; *infra*, p. 22), and provides that "*the capital stock* and personal property of said corporations shall be "exempt from taxation, *except as in this act prescribed*" (*Id.*, Sec. 8). In 1881, it is true, the Legislature, in order to avoid the effect of the Bank Tax case (2 Wall., 200), changed the name of the tax (Laws of 1881, Ch. 361, Sec. 3; *infra*, *p.* 29) and made corresponding changes in the language of these provisions. But no change whatever was made in the character of the tax or in the method of its computation or collection. Indeed, in 1882 the Legislature passed an amendment in which the capital stock is again described as "the basis for tax under the provisions of this act" (Laws of 1882, Ch. 151, Sec. 1; *infra*, p. 33), and this was repeated in 1885 (Laws of 1885, Ch. 501, Sec. 1; *infra*, p. 35). In the latter year, too, it was enacted that the amount of capital stock which should be "the basis for tax" in the case of all corporations liable to taxation, should be the amount of the capital employed within this state (*Id.*; *infra*, p. 35. That is to say, the place where the capital is employed—not where the franchises are granted—controls the amount of the tax. These statutory provisions clearly indicate that the tax is upon capital.

And, unless that be the case, the statute must have most incongruous and unequal effects. For the purpose of the tax corporations are of three classes, (1) those which have paid less than six per cent div-

idends ; (2) those which have paid six per cent, and (3) those which have paid more than six per cent. Those which have paid less than six per cent are taxed one and a half mills per dollar of the actual value of their capital stock. Those which have paid six per cent are taxed one and a half mills per dollar of the amount of their stock. Those which have paid more than six per cent are taxed for each additional one per cent of dividend one quarter mill more per dollar of the amount of their stock. In case a corporation has preferred stock upon which it has paid six per cent, and common stock upon which it has paid less, it is taxed upon the preferred stock at the rate of one and a half mills of the amount thereof, and upon the common stock at the rate of one and a half mills per dollar of actual value (Laws of 1881, Ch. 361, Sec. 3 ; *infra*, p. 29, and re-enacted Laws of 1885, Ch. 359.)

In the case of corporations paying less than six per cent, then, the act provides that there shall be a tax upon the " actual value " of their capital. It is settled that a tax in that form is a tax upon the property in which the capital is invested, and that corporations upon which it is imposed are entitled to deduct their United States bonds from the amount of the assessment (Bank of Commerce vs. New York, 2 Black, 620; Bank Tax Case, 2 Wallace, 200). But if the tax upon corporations paying six per cent or more be a franchise tax, such corporations will not be entitled to the deduction for their United States bonds to which those paying less than six per cent are entitled. Still further, where a corporation has paid less than six per cent upon its common stock and that amount or more upon its preferred stock, it will be entitled to exemption as to its common stock for the amount of its capital invested in United States bonds, but not as to its preferred stock, although all its capital may be so invested.

If, on the other hand, the tax be a tax upon capital, the statute leads to no such incongruous and unequal results. Those corporations which have paid less than six per cent are taxed one and a half mills per dollar of the actual value of their capital. Those which have paid six per cent are taxed one and a half mills per dollar of the amount of their capital. For, as the stock pays the legal rate of interest, it is assumed to be worth par—its actual value and nominal amount will be the same. Those which have paid more than six per cent are taxed for each additional one per cent of dividend one quarter mill more per dollar of the amount of

their stock. For, as the rate of dividend rises, the value of the capital will rise above par. So, too, where a corporation has preferred stock which has paid six per cent or more and common stock which has paid less. Thus the rule is uniform in all cases. Each corporation is taxed as nearly as may be on the actual value of its capital stock, both common and preferred.

If, then, this be a tax upon capital, the statute establishes a comprehensive system which bears equally upon all corporations which it affects. If it be a franchise tax, the statute is utterly incongruous and bears unequally both upon different corporations, and also upon different property of the same corporation. This the court below meets by saying that the legislature has power to impose unequal taxes (p. 22). This may be so. But the same court had already laid down the rule that in matters of taxation "it is a sacred "duty to impose the burdens equally, and to enforce the maxim of law "and ethics alike that equality is equity" (People vs. Commissioners, 76 N. Y., 64, 71). "Equality of taxation is a fundamental principle "of our government, which no legislature, in the absence of the most "explicit provisions, will be presumed to have intended to violate" (People vs. Supervisors, 20 Barb., 81, 88, affd. 16 N. Y., 424). That, doubtless, is the principle of construction to be followed here. The court will, if possible, construe the statute so as to impose its burdens justly and equally. Especially should this be so when the opposite construction is sought solely for the purpose of imposing a burden upon property which this court has uniformly held to be exempt from taxation by the states.

The statute, indeed admits of no construction other than that which will produce this result. The tax is a percentage upon the capital. The amount of this percentage varies. But the subject matter taxed remains the same. That is the capital. The rate of tax increases or diminishes with the rate of dividend. There is no method of determining, with absolute exactness, the actual value of the capital stock of a corporation during any considerable period. But no surer standard can be suggested than its results during that period—the dividends which it has earned. For, while market value or any similar test is dependent largely upon expectation for the future, the dividends made during the period in question measure the value of the stock during that time, as shown by experience (Oswego Starch Factory vs. Dolloway, 21 N. Y., 449; Commonwealth vs. Railroad Co., 29 Pa. St., 370; Lehigh Co. vs. Commonwealth, 55 Pa. St., 448). A tax varying in proportion to

the dividends must, therefore, vary in proportion to the actual value of the capital stock. The tax, then, is a percentage upon the capital varying with its actual value; or, in other words, a tax upon the capital at its actual value.

> Ever since 1853, it may be remarked, it has been the policy and practice of the State to tax corporations upon the actual value of their stock (People vs. Ferguson, 38 N. Y., 89). At this late day it is suggested that such variation of the rate of taxation shows that the tax is imposed upon the franchise and "measured by its dividend-paying power." But this is a complete misapprehension. A franchise in itself has no dividend-paying power. Dividends are the result, not merely of the franchise, but of all the other property as well.

The provisions of this act have been judicially construed in accordance with these views. They were copied literally from a statute of Pennsylvania (Laws of 1879, p. 114, Sec. 4) and have long existed there in the same substantial form (Laws of 1844, p. 498, Sec. 33; 1859, p. 529; 1868, p. 109, Sec. 4). It is well settled there that they impose a tax upon the property of the corporation (Westchester Co. vs. County of Chester, 30 Pa. St., 232; Lackawanna Co. vs. Luzerne County, 42 Pa. St., 424, 430; Phœnix Iron Co. vs. Commonwealth, 59 Pa. St., 104; Commonwealth vs. Pittsburg Co., 74 Pa. St., 83; Catawissa Co.'s Appeal, 78 Pa. St., 59; Coatesville Gas Co. vs. County of Chester, 97 Pa. St., 476, 481); and that "the dividend of profit earned by the "stock is but a means of ascertaining its value" (Lehigh Co. vs. Commonwealth, 55 Pa. St., 448, 451). In Commonwealth vs. Standard Oil Co., 101 Pa. St., 119, the statute discussed was identical with the one now involved (see p. 122). The trial court, after reviewing the above cases, had said, "in view of this array of "authoritative decisions we cannot avoid the conclusion that the "tax in question in this case is a tax upon the tangible property of "defendant, represented by its capital stock (p. 130)." It was held that deduction must, therefore, be made for property not within the jurisdiction of the court. This the Supreme Court affirmed, saying "the tax in this case is in no sense a license tax (p. 146)." It may be again remarked that the legislature of New York, in 1885, adopted these views by enacting that the amount of capital stock which should be the basis for tax should be merely the amount employed within the state (Laws of 1885, Chap. 501, Sec. 11; *infra*, p. 35). The Pennsylvania statute, too, was before this court in Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, and was then

regarded as imposing "a tax upon the capital" of corporations affected.

From the terms of the act, and upon authority also, it is manifest that this is a tax, not upon defendant's franchise, but upon its capital stock at actual value. It comes precisely within the rules laid down, as above stated (*supra*, pp. 2, 3), in Bank of Commerce vs. New York (2 Black, 620), and the Bank Tax Case (2 Wall., 200). Indeed, the tax in the Bank Tax case possessed in a much greater degree than the present, the character of a tax upon franchise. For there the tax was upon the amount of the stock. Even if, by reason of losses, the capital had possessed little or no value it would equally have been taxable. But here, as has been shown, the tax depends entirely upon the actual value of the stock. Any question in the premises is finally disposed of by Philadelphia Company vs. Pennsylvania, 122 U. S., 326. For there, as has been seen, it is held that a tax upon the income of a corporation is a tax, not upon its franchise, but upon the property from which the income is received. And the rule must clearly be the same when, as here, the tax is levied upon that part of the income of the corporation which has been distributed among its stockholders.

The tax, therefore, does not apply to the part of defendant's capital invested in United States bonds.

If, however, defendant be taxable upon the basis of its entire capital, including the bonds, the tax is repugnant to the Fourteenth Amendment of the Constitution of the United States.

It is provided by the Fourteenth Amendment (Sec. 1) that no "state shall deprive any person of life, liberty or property without "due process of law, nor deny to any person within its jurisdiction "the equal protection of the laws." And the defendant is a person within the meaning of this provision (County of Santa Clara vs. Southern Pacific Company, 118 U. S., 394; Pembina Co. vs. Pennsylvania, 125 U. S., 181, 189; Missouri Railway Co. vs. Mackey, 127 U. S., 205.

Inequality of taxation is such a denial of equal protection. This was ruled in Strauder vs. West Virginia (100 U. S., 303). The court, speaking of the act of congress providing that "all "persons within the jurisdiction of the United States * * "in every state and territory * * shall be subject to

" like * * *taxes, licenses* and exactions of every kind as " white citizens and no other" (R. S., Sec. 1977), said "This act " puts in the form of a statute what had been substantially ordained " by the constitutional amendment." That is to say unequal taxes or licenses are prohibited thereby. This seems to be recognized in California vs. Pacific Railroad Company, 127 U. S., 1. So, too, in the case of County of San Mateo vs. Southern Pacific Company 8 Sawyer, 238; 13 Fed. Rep., 722. The constitution of California provided that, except as to "railroad and other *quasi* public corporations," in assessing property for taxation mortgages should be deducted; but that, in the case of railroads operated in more than one county, there should be no such deduction. The court, (FIELD and SAWYER, JJ.), held that a corporation is entitled, under the amendment, to the equal protection of the laws; that this implies that it is exempt from any greater burdens or charges by way of taxation than such as are equally imposed upon all others under like circumstances; that uniformity of taxation requires uniformity in the mode of assessment, as well as in the rate of percentage charged, and that, in the different modes prescribed by the California constitution of assessing the value of the property of natural persons and of railroad corporations as the basis of taxation, there was a departure from the rule of equality and uniformity.

" Unequal exactions in every form or under any pretense are " absolutely forbidden, and of course unequal taxation, for it is " in that form that oppressive burdens are usually laid. It is " not possible to conceive of equal protection under any system " of laws where arbitrary and unequal taxation is permissible; " where different persons may be taxed on their property of the " same kind, similarly situated, at different rates; where, for " instance, one may be taxed at one per cent on the value of " his property, another at two or five per cent, or where one " may be thus taxed according to his color, because he is white " or black, or brown, or yellow, or according to any other rule " than that of a fixed rate proportionate to the value of his " property (8 Sawyer, 251, 252).

" In the constitution of several states a provision is found re- " quiring 'equality and uniformity' in the taxation of property, " and this is held to mean that taxes must be levied according " to some fixed rate or rule of apportionment, so that all per- " sons shall pay the like amount upon similar kinds of property " of the same value. * * What is called for under a con- " stitutional provision requiring equality and uniformity in the " taxation of property must be equally called for by the Four- " teenth Amendment. The forced contribution from one which

"would follow taxation of his property without reference to a "common ratio, would be inconsistent with that equal protection "which the amendment requires the state to extend to every per- "son within its jurisdiction (*Id.*, 252). * * As the foundation "of all just and equitable taxation is the assessment of the "property taxed—that is, the ascertainment of its value in "order that the tax may be levied according to some ratio to "the value—uniformity of taxation necessarily requires uniform- "ity in the mode of assessment, as well as in the rate of taxa- "tion; or, to quote the language of the Supreme Court of Ohio "expressing the same thought, 'uniformity in taxing implies "'equality in the burden of taxation, and this equality of burden "'cannot exist without uniformity in the mode of assessment as "'well as in the rate of taxation.' (Exchange Bank of Columbus "vs. Hines, 3 Ohio St. Rep., 1)" (*Id.*, 254.)

In that case, then, it is distinctly held that inequality of taxation exists when by reason of deductions allowed in one case and not in another, there are different modes of assessment upon similar property. And this court, too, has so held.

In People vs. Weaver, 100 U. S., 539, a statute of the state permitted taxpayers to deduct the amount of their debts from the valuation of their personal property save in the case of national bank shares where no such deduction was permitted. It was held that this violated the requirement of the national bank act that bank shares should not be taxed at a greater rate than other moneyed capital. To the same effect are Supervisors vs. Stanley, 105 U. S., 305; Evansville Bank vs. Britton, 105 U. S., 322; County of Santa Clara vs. Southern Pacific Company, 18 Fed. Rep., 385, 398.

The present application of these principles is manifest. The tax upon corporations declaring less than six per cent, as has been seen, is a tax upon their property, and they are entitled to deduct from the assessment the amount of their United States bonds. This is incontrovertible (Bank Tax Case, 2 Wallace, 200). Unless, then, those declaring over six per cent are allowed the same deduction—are relieved from taxation to the extent of their United States bonds—the tax is unequal and therefore unconstitutional.

It is suggested that the legislature has power to classify corporations for purposes of taxation (p. 22). No doubt it may divide them into as many classes as the different pursuits followed by them may require (Railroad Tax Cases, 92 U. S., 575). But there can be no classification by arbitrary rules among those engaged in the same business, in the same locality. There can be no subdivisions merely according to wealth or prosperity. This does not satisfy the requirement of uniformity. The rule of equality in respect to the sub-

ject " requires the same means and methods to be applied impartially " to all the constituents of each class, so that the law shall operate " equally and uniformly upon all persons in similar circumstances " (Kentucky Railroad Tax Cases, 115 U. S., 337). " It means that no " person or class of persons shall be denied the same protection of the " laws which is enjoyed by other persons or other classes in the " same place and under like circumstances " (Missouri vs. Lewis, 101 U. S., 22, 31).

In San Mateo County vs Southern Pacific Company (*supra*), the court said, " It is no answer to this discrimination to say that " property in the state may be divided into classes, and " different rates prescribed for them. Undoubtedly prop- " erty may be classified for purposes of taxation. Real property " may be subjected to one rate of taxation, personal property " to another rate. Property in particular districts may be " taxed for local purposes, whilst property elsewhere may " be exempt. Taxation on business in the form of licenses " may also vary according to the calling or occupation " licensed and the extent of business transacted; but even " then there must be uniformity of charges with respect to the " same calling or occupation in the same locality (FIELD, J., 8 Saw- " yer,256). The ground of complaint here is that the law requires a " higher value to be placed upon the defendant's property than " upon the property of individuals similarly encumbered,or rather " requires the assessor of the defendant's property, in estimat- " ing its value, to disregard and set aside certain elements ma- " terially affecting its amount, which are to be considered in esti- " mating the value of the property of individuals. It is not " classifying property to make this distinction in determining its " value. It is not classifying property to provide that the prop- " erty of certain parties, which has a mortgage upon it, shall be " assessed at its value after deducting the mortgage, and that " the property of other parties, also having a mortgage upon it, " shall be taxed at its full value, without any deduction. That " is not providing for a different rate of taxation for different " kinds of property, but for unequal taxation according to the " character of the owner (FIELD, J., *Id.*, 257).

" Classification should have reference to the different char- " acter, situation and circumstances of the property, making a " different form or mode of taxation proper, if not absolutely " necessary. It cannot be arbitrarily made with mere reference " to the nationality, color, or character of the owners, whether " natural or artificial persons, without any reference to a differ- " ence in the character, situation or circumstances of the prop- " erty. If the arbitrary discrimination and classification found " in this case can be legally made under the constitution and " the law of the land, then the subordinate State constitution or

" law can be so framed as to dispose of a man's rights in prop-
" erty of all kinds by arbitrary classification and definition with-
" out regard to the real facts, circumstances, or condition of the
" property. A person may be classified and defined out of the
" equal protection of the law; and if so with reference to this
" provision, he can also be classified and defined out of uni-
" formity in the operation of the laws in other particulars; * *
" indeed, out of all the guarantees of the constitution, state
" or national (SAWYER, C. J., *Id.*, 307).

To the same effect are, Gilman vs. Sheboygan, 2 Black, 510. Albany City Bank vs. Maher, 9 Fed. Rep., 884. County of Santa Clara vs. Southern Pacific Co., 18 Fed. Rep., 385, 396, 409, 436. Dundee Co. vs. School Dist., 19 Fed. Rep., 359. Stuart vs. Palmer, 74 N. Y., 183, 189. State vs. Township, 36 New Jersey L., 66, 70. City vs. McQuillan, 9 Dana, 513. Howell vs. Bristol, 8 Bush, 493, 498. Attorney-General vs. Winnebago Co., 11 Wis., 35, 42. City of New Orleans vs. Home Ins. Co., 23 La. Ann., 449. *In re* Ah Fong, 3 Sawyer, 144, 145. Ah Kow vs. Nunan, 5 Sawyer, 552. Parrott's Case, 6 Sawyer, 349. Louisville & N. R. Co. vs. Railroad Comm., 19 Fed. Rep., 679.

Upon principle the rule in regard to uniformity of taxation upon franchises must be the same as in regard to taxes upon any other property. There can be no more reason why arbitrary distinctions should be made between persons owning that species of property than between the owner of property of any other kind. And it is so held (County of San Mateo vs. Southern Pacific Co., 8 Sawyer, 256; Portland Bank vs. Apthorp, 12 Mass., 252, 258; Commonwealth vs. People's Savings Bank, 5 Allen, 428, 431; Oliver vs. Washington Mills, 11 Allen, 268; State vs. Merchants' Ins. Co., 12 La. Ann., 802; Parish vs. Cochran, 20 La. Ann., 373; City of East St. Louis vs. Wehrung, 46 Ill., 392).

If, then, the tax upon the defendant be a tax upon franchise, the statute is unconstitutional. For it subjects defendant to assessment and taxation upon its franchises at a higher rate than that imposed upon others in precisely the same situation. It, therefore, denies to the defendant equal protection of the laws.

The Judgment should be Reversed.

While the legislature has seen fit to describe the tax as a tax upon corporate franchise or business, examination shows it to be, in fact, a tax upon defendant's capital stock at its actual value. Defendant is, therefore, entitled to deduct its United States bonds. But if de-

fendant is not entitled to such deduction the statute is unconstitutional. For other similar corporations are entitled thereto and the act, therefore, contravenes the rule that no state shall deny to any person the equal protection of the laws.

If this tax be upheld, the exemption from state taxation of United States bonds in the hands of corporations is practically gone. Adopting the form of this statute and calling the tax a tax upon franchise or business, any state may impose a tax to be computed upon the capital at whatsoever rate it sees fit. For "it must always be remembered that, if the right to impose a tax at all exists, it is a right which in its nature acknowledges no limits." (Bank of Commerce vs. New York, 2 Black, 620, 634)—"the power to tax involves "the power to destroy" (California vs. Railroad Co., 127 U. S., 1, 41). And such tax must be paid, although all the capital be invested in United States bonds. Surely this court will not suffer the great principle of public policy that the states have no power, by "taxa-"tion or otherwise, to retard, impede, burden or in any manner con-"trol the operations of the national government" (McCulloch vs. Maryland, 4 Wheaton, 316, 436; Lane County vs. Oregon, 7 Wall., 71, 77; California vs. Railroad Co., 127 U. S., 1), to be thus lightly frittered away.

B. H. Bristow,
David Willcox,
Of Counsel for Plaintiff in Error.

STATUTES OF NEW YORK.

LAWS OF 1880, CHAP. 542.

AN ACT to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations.

Passed June 1, 1880 ; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

SECTION 1. Hereafter, it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its capital stock, as provided in section three of this act, to make report in writing to the comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations during the year ending with the first day of said month. In all cases where any such corporation, joint-stock company or association shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock during the year ending as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November in each year in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, not less, however, than the average price which said stock sold for during said year ; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same ; provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized

and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the estate thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled may within ten days appeal therefrom to the board of equalization, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest so due on said account, as settled by the comptroller, be deposited with the State treasurer.

§ 2. If the said officers of any such corporation, joint-stock company or association shall neglect or refuse to furnish the comptroller, on or before the fifteenth day of November of each and every year, with the report aforesaid, or the certificate of appraisement, and oath or affirmation, as the case may be, as required by the first section of this act, it shall be the duty of the comptroller of the State to add ten per centum to the tax of said corporation for each and every year for which such report or certificate of appraisement and oath or affirmation were not so furnished, which percentage shall be assessed and collected with the said tax in the usual manner of assessing and collecting such taxes; provided, that if said officers of any such corporation, joint-stock company or association shall intentionally fail to comply with the provisions of the first section of this act for two successive years, the comptroller shall report the fact to the governor, who, if he shall be made satisfied that such failure was intentional, shall thereupon direct the attorney-general to take proceedings, in the name of the people of this State, to declare the charter of said corporation, joint-stock company or association forfeited, and its chartered privileges at an end; and for such intentional failure, the charter, chartered privileges, corporate rights and franchises of every such corporation, joint-stock company or association shall cease, end, and be determined.

§ 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State, shall be subject to and pay a tax into the treasury of the State annually, to be computed as follows: If the dividend or dividends, made or declared by such corporation, joint-stock

company or association, during any year ending with the first Monday in November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividend so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of valuation, made also in accordance with the provisions of the first section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum.

§ 4. It shall be the duty of the treasurer or other officer, having charge of any corporation, joint-stock company or association, upon which a tax is imposed by either of the preceding sections of this act, to transmit the amount of said tax to the treasury of the State within fifteen days from the first day of January in each and every year.

§ 5. Hereafter it shall be the duty of the president, secretary, or other proper officer of each and every insurance company or association incorporated by or under any law of this State, except life insurance companies, and purely mutual beneficial associations, whose fund for the benefit of members, their families, or heirs, is made up entirely of contributions of their members, and the accumulated interest thereon, to make report in writing to the comptroller semi-annually upon the first days of August and February in each year

setting forth the entire amount of premiums received on business done in this State by such company or association during the six months ending the preceding first days of July and January, whether the said premiums were received in money or in the form of notes, credits, or any other substitute for money, and every such corporation or association shall pay into the State treasury at the dates aforesaid a tax of eight-tenths of one per centum upon the gross amount of said premium; provided, that said report shall be made under oath or affirmation, and that it shall be the duty of the comptroller of the State to add ten per centum to the account of any company or association whose officers shall neglect or refuse for a period of thirty days to make the said report, or to pay into the State treasury the tax imposed by this section. Every fire or marine insurance company organized under the laws of any other State or country, and doing business in this State, and every person, partnership, corporation, or company doing a fire or marine insurance business in this State, shall pay into the treasury on the first day of February and August in each year, a tax of eight-tenths of one percentum on their gross premiums received by them on business transacted in this State during the six months preceding the first day of January and July. And every such company, person, partnership, or corporation, or the agents and officers thereof in this State shall make report in writing to the comptroller semi-annually, upon the first day of February and August in each year, setting forth the entire amount of premiums received.

§ 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated by or under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other State, and doing business in this State, and every express company, palace car or sleeping car company, incorporated or unincorporated, doing business in this State, shall pay to the State

treasurer for the use of the State a tax of five-tenths of one per centum upon the gross earnings in this State of said corporation or company, for tolls, transportation, telegraph or express business transacted in this State, and in arriving at the gross earnings of any express, palace car or sleeping car company, or freight line, there shall be first deducted the expenses paid to any common carrier for transportation upon such business within this State. Nothing in this section contained shall be held to apply to any street surface railroad company.

§ 7. The tax imposed under section six of this act shall be paid semi-annually, upon the first days of February and August of each year, the first payment to be made on the first day of August, A. D. eighteen hundred and eighty, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the corporations, joint-stock companies or associations therein referred to, to transmit to the comptroller a statement, under oath or affirmation, of the amount of the gross receipts of the said associations, corporations or joint-stock companies derived from all sources during the preceding six months, and if any such corporation, joint-stock company or association shall neglect or refuse, for a period of thirty days after such tax becomes due, to make returns or to pay the same, the amount thereof, with the addition of ten per centum thereto, shall be collected for the use of the State as other taxes are recoverable by law, from such corporation, joint-stock company or association.

§ 8. The lands and real estate of the various corporations, joint-stock companies and associations mentioned in this act shall continue to be assessed and taxed where situated, but the capital stock and personal property of said corporations, joint-stock companies and associations shall hereafter be exempt from assessment or taxation, except as in this act prescribed, and no tax on gross receipts, except as in this statute authorized, shall be imposed or charged against any street horse-railroad company.

§ 9. The taxes imposed by this act, and the revenue derived therefrom shall be applicable to the payment of the ordinary and current expenses of the State, and if any corporation, joint-stock company or association shall neglect or refuse to pay any tax by this act required to be paid, the same may be sued for in the name of the people of the State, and recovered in any court of competent jurisdiction, in an action to be brought by the attorney-general at the instance of the comptroller.

§ 10. This act shall take effect immediately.

LAWS OF 1881, CHAPTER 361.

AN ACT to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled "An Act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations."

Passed May 26th, 1881; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled "An act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations," is hereby amended so as to read as follows:

§ 1. Hereafter it shall be the duty of the president or treasurer of every association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, as provided in section three of this act, to make report in writing to the comptroller, annually, on or before the fifteenth day of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations, joint-stock companies or associations, during the year ending with the first day of said month. In all cases where any such corporation, joint-stock companies or associations shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared upon either its common or preferred stock during the year e ding as aforesaid, shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November, in each year, in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared, or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in

cash, not less, however, than the average price which said stock sold for during said year; and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the comptroller a certificate thereof, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same; provided, that if the comptroller is not satisfied with the valuation so made and returned, he is hereby authorized and empowered to make a valuation thereof and to settle an account upon the valuation so made by him for the taxes, penalties and interest due the State thereon; and any association, corporation or joint-stock company dissatisfied with the account so settled, may within ten days appeal therefrom to a board consisting of the secretary of State, attorney-general and state treasurer, which board, on such appeal, shall affirm or correct the account so settled by the comptroller, and the decision of said board shall be final; but such appeal shall not stay proceedings unless the full amount of the taxes, penalties and interest as due on said account, as settled by the comptroller, be deposited with the state treasurer.

§ 2. If the said officers of any such corporation, joint-stock company or association shall neglect or refuse to furnish the comptroller, on or before the fifteenth day of November of each and every year, with the report aforesaid, or the certificate of appraisement, and oath or affirmation, as the case may be, as required by the first section of this act, or to pay the tax imposed on such corporation, company or association within fifteen days after the first of January as provided in the fourth section of this act, it shall be the duty of the comptroller of the state to add ten per centum to the tax of said corporation, company or association, for each and every year for which such report or certificate of appraisement and oath or affirmation were not so furnished, or for which such tax shall not have been paid, which percentage shall be assessed and collected with the said tax in the usual manner of assessing and collecting such taxes; provided, that if said officers of any such corporation, joint-stock company or association shall intentionally fail to comply with the provisions of the first or fourth section of this act for one year, the comptroller shall report the fact to the governor, who, if he shall be made satisfied that such failure was intentional, shall thereupon direct the attorney-general to take proceedings, in the name of the people of this State, to declare the charter or privileges of said corporation, joint-stock company or association forfeited, and at an

end; and for such intentional failure duly found, the charter and privileges of every such corporation, company or association shall cease, end, and be determined.

§ 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country and doing business in this state, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this state, which exception shall not be taken to include gas companies or trust companies, shall be subject to and pay a tax, as a tax upon its corporate franchise or business, into the treasury of the state annually, to be computed as follows: If the dividend or dividends made or declared by such corporation, joint-stock company or association, during any year ending with the first day of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividends so made or declared; or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as, for instance, common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum.

§ 4. It shall be the duty of the treasurer or other officer having charge of any corporation, joint-stock company or association, upon which a tax is imposed by either of the preceding sections of this act to transmit the amount of said tax to the treasury of the state within fifteen days after the first day of January in each and every year.

§ 5. Hereafter it shall be the duty of the president, secretary, or other proper officer of every insurance company and every association organized or incorporated by or under any law of this state, and of every person or partnership doing an insurance business in this state (except life insurance companies, and purely mutual beneficial associations, whose fund for the benefit of members, their families, or heirs, is made up entirely of contributions of their members, and the accumulated interest thereon), to make report in writing to the comptroller annually upon the first day of August in each year, after the first day of August, eighteen hundred and eighty-one, setting forth the entire amount of premiums received on business done in this state by such company or association, person or partnership during the year ending with the preceding thirtieth day of June, whether the said premiums were in money or in the form of notes, credits, or any other substitute for money, and every such company, association, person or partnership shall pay into the state treasury, at the date aforesaid, a tax, as a tax on its corporate franchise or business, at the rate of eight-tenths of one per centum upon the gross amount of said premiums. And every company or association organized under the laws of any other state or country, and every person or partnership doing an insurance business in this state, except as aforesaid, shall pay into the treasury on the first day of August in each year a tax at the rate of eight-tenths of one per centum on their gross premiums received by them on business transacted in this state during the year ending with the preceding thirtieth day of June, whether the said premiums were in money or in the form of notes, credits, or any other substitute for money. And every such company, association, person, partnership, or the agents and officers thereof, in this state shall make report in writing to the comptroller annually upon the first day of August in each year, setting forth the entire amount of premiums received during the period aforesaid. Provided, that the reports above required shall be made under oath or affirmation, and that it shall be the duty of the comptroller of the state to add ten per centum to the account of any company, association, person, or partnership, which shall neglect or refuse for a period of thirty days to make the said report, or

to pay into the state treasury the tax imposed by this section. And it shall also be the duty of the president, secretary, or other proper officer of each and every insurance company, association, partnership, and of every person liable to be taxed under this section, to make a report in writing to the comptroller on the first day of August, eighteen hundred and eighty-one, under oath or affirmation, of the entire amount of premiums received on business done in this state during the six months ending with the preceding thirtieth day of June, and to pay a tax at the rate of eight-tenths of one per centum thereon. And it shall be the duty of the comptroller of the state to add ten per centum to the account of any company, association, person or partnership, which shall neglect or refuse for a period of thirty days to make the said report, or to pay into the state treasury the tax imposed.

§ 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated or organized by or under any law of this state, or now or hereafter incorporated or organized by or under the laws of any other state or country and doing business in this state, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other state, and doing business in this state, and every express company or association, palace-car or sleeping-car company or association incorporated or unincorporated, doing business in this state, shall pay to the state treasurer for the use of the state, as a tax upon its corporate franchise or business in this state, a tax, at the rate of five-tenths of one per centum upon the gross earnings in this state of said corporation or company or association, for tolls, transportation, telegraph, telephone or express business transacted in this state.

§ 7. The tax imposed under section six of this act shall, after the first day of August, eighteen hundred and eighty-one, be paid annually on the first day of August of each year. It shall be the duty of the president, secretary or other proper officer of the corporations, joint-stock companies or associations referred to in section six of

records of any such association, corporation or joint-stock association, and fix and determine the amount of tax due in pursuance of the provisions of this act, and in case of the non-payment of the amount of tax so ascertained to be due, together with the expenses of such examination for a period of thirty days after notice to any association, corporation or joint-stock company so in default, the same may be sued for in the name of the people of the state, and recovered in the same manner provided in section nine of this act.

§ 13. The comptroller is authorized to issue subpœnas requiring the attendance before him of any officer, agent, clerk or employee of any association, corporation or joint-stock company liable to be taxed on its corporate franchise or business, capital or dividends under any of the provisions of this act, and to administer oaths to and examine them or any one or more of them on oath in relation to any matter which may in any way be material in determining the amount of the tax to be paid by any such association, corporation or joint-stock company; it shall be the duty of the person or persons thus subpœnaed to attend as thereby required and give testimony on the subject aforesaid, and in case of failure to so attend to testify, the person so failing shall be guilty of a contempt, and any special term of the Supreme Court may adjudge and determine the punishment therefor in the same manner and to the same extent as provided in the Code of Civil Procedure for the punishment of contempt of court other than criminal contempt.

§ 2. This act shall take effect immediately.

LAWS OF 1885, CHAP. 501.

AN ACT to amend chapter one hundred and fifty-one of the laws of eighteen hundred and eighty-two, entitled "An act to amend chapter three hundred and sixty-one, of the laws of eighteen hundred and eighty-one, entitled 'An act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations.'"

Passed, June 13, 1885; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter one hundred and fifty-one of the laws of eighteen hundred and eighty-two, entitled "An act to amend chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled an act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations,'" is hereby amended so as to read as follows:

§ 1. Chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, entitled "An act to amend chapter five hundred and forty-two of the laws of eighteen hundred and eighty, entitled 'An act to provide for raising taxes for the use of the state upon certain corporations, joint-stock companies and associations,'" is hereby amended by adding thereto nine additional sections, to be called sections eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen, to read as follows:

§ 11. The amount of capital stock which shall be the basis for tax under the provisions of section three of this act, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this state. In making to the comptroller the report in writing or certificate of estimate and appraisal of the capital stock of such corporation, joint-stock company or association provided for by the first section of this act, it shall be the duty of the president or treasurer thereof, as the case may be, to state specifically the amount of capital stock employed within this state, of such corporation, joint-stock company or association. Whenever the comptroller is dissatisfied

with such report or certificate of estimate and appraisal, as the case may be, of any corporation, joint-stock company or association whose capital is only partially employed within this state, he is authorized and empowered to ascertain, fix and determine the amount of capital employed within this state, and to settle an account for the taxes and penalties due the state thereon.

§ 12. Whenever any corporation, joint-stock company or association liable to make reports or certificates of estimate and appraisal to the comptroller, under any of the provisions of this act, shall neglect or refuse to make such report or reports within the time prescribed in this act, or shall make such report or certificate as shall be unsatisfactory to the comptroller, the comptroller is authorized to examine, or cause to be examined, the books and records of any such corporation, joint-stock company or association, and to fix and determine the amount of tax and penalty due in pursuance of the provisions of this act, either from the said books and records, or from any other data in his possession which shall be satisfactory to him, and to settle an account for said tax and penalty, together with the expenses of such examination, against said corporation, joint-stock company or association.

§ 13. Whenever the comptroller shall deem it necessary or important to examine any person as a witness upon any subject or matter relating to the amount of capital stock of such corporation, or to use, examine or inspect any book, account, voucher or document in possession of any officer of such corporation, or other person, or under his control, relating to such capital stock and tax, he shall have the power to issue a subpœna in proper form, commanding such person or officer to appear before him or some person designated as commissioner by him by an appointment in writing, filed in the office of such comptroller, at a time and at the place where the principal office of such corporation is situated within this state in such subpœna specified, to be examined as a witness, and such subpœna may contain a clause requiring such person or officer to produce on such examination all books, papers and documents in his possession or under his control, relating to the capital stock of such corporation and the amount thereof employed within this state. Such subpœna shall be served upon the person named by showing him the original subpœna and delivering to and leaving with him at the same time a copy thereof. The comptroller or the commissioner so designated by him as aforesaid may administer oaths to such persons as he may desire to examine, so brought before him by sub-

pœna or otherwise, and examine them on oath in relation to any matter which may in anywise be material in determining the amount of the tax to be paid by any such corporation, joint-stock company or association as aforesaid. Whenever any person duly subpœnaed to appear and give evidence as aforesaid, or to produce any books and papers as hereinbefore provided, shall neglect or refuse to appear or to produce such books and papers according to the exigency of such subpœna, or shall refuse to testify before said comptroller or the commissioner so designated by him, or to answer any proper and pertinent question, he shall be deemed in contempt, and thereupon any justice of the supreme court of the judicial district within which the principal office of such corporation within this state is situated shall, upon the motion of the comptroller, based upon affidavit showing the commission of the offence, either, first, make an order requiring the accused to show cause before him, at a time and place specified therein, why the accused should not be punished for the alleged offence; or, second, issue a warrant of attachment directed to the sheriff of a particular county, or generally directed to the sheriff of any county where the man may be found, commanding him to bring him before said justice either forthwith or at a time and place therein specified, to answer for the alleged offense. On the return of said attachment and the production of the body of the defendant therein the said justice shall have jurisdiction in the matter, and the person charged may purge himself of the contempt in the same way, and the same proceedings shall be had, and the same penalties may be imposed and the same punishments inflicted as in the case of a witness subpœnaed to appear and give evidence as is prescribed in title three, chapter seventeen of the Code of Civil Procedure, in proceedings to punish a contempt of court other than a criminal contempt.

§ 14. The comptroller is hereby authorized and directed, upon application made to him by any corporation, joint-stock company or association, to make, settle and adjust all accounts against such corporation, joint-stock company or association, for all taxes and penalties arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, by taking as a basis for taxation the capital employed within the state by such corporation, joint-stock company or association. Provided, however, that such corporation, joint-stock company or association shall not be entitled to the benefit of a settlement upon such basis unless it shall have secured such adjustment and paid into the treasury the full amount of the taxes so settled, before the first day

of August, eighteen hundred and eighty-five, nor shall this section apply to the case of any tax for which suit shall have been heretofore brought by the attorney-general, in which suit the trial has been commenced, or in which judgment shall have been entered heretofore for the people for the amount of said tax. Any corporation, joint-stock company or association whose capital has heretofore been only partially employed within this state, and which is now liable for taxes arising under the third section of this act since the twelfth day of May, A. D. eighteen hundred and eighty-two, and which are still due and unpaid, may, at any time prior to the first day of August, eighteen hundred and eighty-five, pay to the state treasurer, for the use of the state, in full discharge of the same, such sum of money as shall be fixed by the comptroller as the tax due for the said period by the said corporation, joint-stock company or association, upon the basis of the capital employed within the state. Provided, that this section shall not apply to the case of any tax for which suit may have heretofore been brought by the attorney-general, and for which judgment shall have been entered therein, or if in such suit trial has been commenced.

§ 15. All accounts hereafter settled by the comptroller agreeably to the provisions of this act shall bear interest from a date thirty days after the sending of notice of settlement, hereinafter provided for, until full payment thereof shall be made.

§ 16. It shall be the duty of the comptroller after making with any partnership, corporation, joint-stock company or association liable to taxation under any of the provisions of this act, the settlement of such taxes, to forthwith send notice hereof, in writing, to such person, partnership, corporation, joint-stock company or association, which notice may be sent by mail to the post-office address of such corporation, joint-stock company or association.

§ 17. No writ of certiorari to review the determination and settlement of the comptroller as to the amount of capital used within the state by any corporation, joint-stock company or association, and as to the tax and penalty to be paid thereon, shall be granted, except application therefor be made within thirty days after service upon such corporation, joint-stock company or association by the comptroller of notice of such settlement. Nor shall any such writ be granted except the papers upon which motion therefor is to be made, including notice of motion, shall have been served upon the comptroller at least eight days before such motion, nor unless the corporation, joint-stock company or association applying for such

writ shall, before making such motion, have deposited with the state treasurer the full amount of taxes, penalties and charges so settled and adjusted by the comptroller, and filed with him an undertaking in such amount, and with such sufficient sureties as shall be approved by one of the justices of the supreme court of this state, to the effect that if said writ be vacated and the determination of the comptroller sustained, the applicant for the writ will make payment of all costs and charges which may accrue against such applicant in the prosecution of such writ, including costs on all appeals.

§ 18. After the expiration of thirty days from the service by the comptroller of notice of the settlement aforesaid, if no proceedings shall have been taken to review the same, as provided by this act, or if the deposit with the state treasurer of the amount of the said settlement, together with the undertaking, as provided for by this act, shall not then have been made, it shall be lawful for the comptroller to issue his warrant or warrants under his hand and seal of office directed to the sheriff of any county in this state, commanding him to levy upon and sell the goods and chattels, lands and tenements of the said corporation, joint-stock company or association found within the said county, for the payment of the amount of said settlement, together with interest thereon and costs of executing such warrant, and to return the said warrant to the comptroller, and pay to the state treasurer the money which shall be collected by virtue thereof, by a certain time therein to be specified, not less than sixty days from the date of such warrant. Such warrant shall be a lien upon and shall bind the personal estate of the person, partnership, corporation, joint-stock company or association against whom it shall be issued, from the time an actual levy shall be made by virtue therof, and the sheriff to whom such warrant shall be directed shall proceed upon the same in all respects with the like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgments rendered by a court of record, and shall be entitled to the same fees and costs for his services in executing the same, to be collected in the same manner.

§ 19. This act shall take effect immediately.

OCTOBER TERM, 1886.

Supreme Court of the United States.

Error to the Supreme Court of New York.

THE HOME INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

against

THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

DENIS O'BRIEN, *Attorney General of New York,*
Of Counsel, Albany, N. Y.

ALBANY:
THE ARGUS COMPANY, PRINTERS.
1886.

United States Supreme Court.

THE HOME INSURANCE COMPANY,
PLAINTIFF IN ERROR,
against
THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

Brief for Defendants in Error.

STATEMENT.

The plaintiff in error is a corporation created and organized under the laws of the State of New York, for the transaction of the business of fire insurance, and having its principal place of business in the city and county of New York.

The capital stock of said corporation is $3,000,000, and in the months of January and July, 1881, respectively, a dividend of $150,000 was declared and paid by said company. On the 1st of January, 1881, the corporation had its capital stock and surplus to the amount of $3,300,000 invested in United States government bonds; on July first it had reduced its investment in government securities to the sum of $1,940,000.

Chapter 542 of the Laws of 1880 of the State of New York, as amended by chapter 361 of the Laws of 1881, provided that every corporation organized under the laws

of the State of New York, should pay a tax as a tax upon its *corporate franchise or business* into the treasury of the State, to be computed, if the dividends amounted to more than six per cent, upon the par value of its capital stock, at the rate of one-quarter mill upon the said capital stock for each one per cent of dividend made or declared.

The Comptroller of the State of New York, in accordance with such law and using the amount of capital stock as a basis, computed a tax of two and one-half mills upon each dollar thereof, and demanded the payment of $7,500.

Payment was refused on the ground that the tax was upon the capital stock itself and not upon the franchise, and as a large portion of the capital stock was represented by United States securities, it was to that extent exempt from taxation by State authority.

The questions involved were upon a submitted case, finally decided by the Court of Appeals of the State of New York in favor of the defendant in error, and the tax held to be constitutional and valid.

Plaintiff in error has appealed to this court, alleging that the act of the Legislature is in violation of the first section of the fourteenth amendment to the Constitution of the United States, which provides "that no State shall deny to any person within its jurisdiction the equal protection of its laws, and also alleging that the tax which was computed upon that portion of the capital stock which was invested in government bonds was a tax upon *property* exempt by law from taxation."

POINTS.

I.

THE DECISION OF THE COURT OF APPEALS ON THE CONSTRUCTION OF THE CONSTITUTION AND STATUTES OF NEW YORK WILL BE FOLLOWED BY THIS COURT.

Township of Ellenwood v. Macy, 92 U. S., 289.
Fairfield v. Gallatin Co., 100 U. S., 47.

Questions not decided in the State court, because not raised and presented by the complaining party, will not be re-examined in this court upon a writ of error.

Hamilton Company v. Mass., 6 Wall., 632.
Railway Co. v. Guthard, 114 U. S., 133.

II.

THE TAX IMPOSED UPON THE PLAINTIFF IN ERROR WAS A TAX UPON ITS FRANCHISES, AND NOT UPON ITS PROPERTY OR CAPITAL STOCK.

The Laws of 1880 and 1881 provide as follows:

"SECTION 1. Hereafter it shall be the duty of the "president or treasurer of every association, cor- "poration or joint stock company liable to be "taxed on *its corporate franchise or business*, "as provided in section 3 of this act, to make "report in writing to the Comptroller, annually, "on or before the fifteenth day of November, "stating specifically the amount of capital paid "in, the date, amount and rate per centum of

"each and every dividend declared by their respec-
"tive corporations, joint-stock companies or asso-
"ciations, during the year ending with the first
"day of said month. In all cases where any such
"corporation, joint-stock company or association
"shall fail to make or declare any dividend upon
"either its common or preferred stock during the
"year ending as aforesaid, or in case the dividend
"or dividends made or declared upon either its
"common or preferred stock during the year end-
"ing as aforesaid, shall amount to less than six
"per centum upon the par value of the said com-
"mon or preferred stock, the treasurer and sec-
"retary thereof, after being duly sworn or affirmed
"to do and perform the same with fidelity, accord-
"ing to the best of their know'edge and belief,
"shall, between the first and fifteenth days of
"November in each year in which no dividend
"has been made or declared as aforesaid, or in
"which the dividend or dividends made or
"declared upon either its common or preferred
"stock amounted to less than six per centum
"upon the par value of said common or preferred
"stock, estimate and appraise the capital stock
"of such company upon which no dividend has
"been made or declared, or upon the par value
"of which the dividend or dividends made or
"declared amounted to less than six per centum,
"at its actual value in cash, not less, however,
"than the average price which said stock sold for
"during said year; and when the same shall have

"been so truly estimated and appraised they shall "forthwith forward to the Comptroller a certificate "thereof, accompanied by a copy of their said "oath or affirmation, by them signed, and attested "by the magistrate or other person qualified to "administer the same; provided, that if the "Comptroller is not satisfied with the valuation so "made and returned, he is hereby authorized and "empowered to make a valuation thereof and to "settle an account upon the valuation so made by "him for the taxes, penalties and interest due the "State thereon; and any association, joint-stock "company or corporation dissatisfied with the "account so settled, may within ten days appeal "therefrom to a board consisting of the Secretary "of State, Attorney General and State Treasurer, "which board on such appeal shall affirm or cor- "rect the account so settled by the Comptroller "and the decision of said board shall be final; "but such appeal shall not stay proceedings unless "the full amount of the taxes, penalties and inter- "est as due on said account, as settled by "the Comptroller, be deposited with the State "Treasurer."

"§ 3. Every corporation, joint stock company "or association, whatever, now or hereafter incor- "porated or organized under any law of this State, "or now or hereafter incorporated or organized by "or under the laws of any other State or coun- "try, and doing business in this State, except sav- "ings banks and institutions for savings, life insur-

"ance companies, banks and foreign insurance
"companies and manufacturing corporations carry-
"ing on manufacture within this State, which
"exception shall not be taken to include gas com-
"panies or trust companies, shall be subject to and
"pay a tax, *as a tax upon its corporate franchise*
"*or business*, into the treasury of this State, annu-
"ally, to be computed as follows: If the dividend
"or dividends made or declared by such corpora-
"tion, joint-stock company or association during
"any year ending with the first day of November
"amount to six or more than six per centum upon
"the par value of its capital stock, *then the tax to*
"*be at the rate of one-quarter mill upon the capi-*
"*tal stock for each one per centum of dividend so*
"*made or declared;* or if no dividend be made or
"declared, or if the dividends made or declared
"do not amount to six per centum upon the par
"value of said capital stock, then the tax to be at
"the rate of one and one-half mills upon each dol-
"lar of a valuation of the said capital stock made
"in accordance with the provision of the first section
"of this act, and in case any such corporation, joint-
"stock company or association shall have more than
"one kind of capital stock, as for instance common
"and preferred stock, and upon one of said stocks
"a dividend or dividends amounting to six or more
"than six per centum upon the par value thereof,
"has been made or declared, and upon the other no
"dividend has been made or declared, or the dividend
"or dividends made or declared thereon amount to

"less than six per centum upon the par value "thereof, then the tax shall be at the rate of one-"quarter mill for each one per centum of dividend "made or declared upon the capital stock, upon "the par value of which the dividend or dividends "made or declared amount to six or more than six "per centum, and in addition thereto tax shall be "charged at the rate of one and one half mills upon "each dollar of a valuation, made also in accord-"ance with the provisions of this act, of the capital "stock upon which no dividend was made or "declared, or upon the par value of which the "dividend or dividends made or declared did not "amount to six per centum."

The foregoing sections of the act are the only ones with which the court here is concerned.

Prior to the passage of this act corporations were assessed and taxed upon their capital stock, under the provisions of the Revised Statutes of the State of New York, by the local officials for both local and State purposes.

A comparison of those provisions (2 N. Y. R. S. [7th ed.], 1036, *et seq.*), with those of the act in question, shows radical differences in the method of assessment and collection of the taxes imposed upon these bodies, and clearly discloses the intention of the Legislature, in the enactment of the statutes of 1880 and 1881, to formulate a new and distinct scheme of taxation for all the corporate, associate or joint-stock bodies, included within the terms of its provisions.

The law of 1881, upon which this question arises, recognizes the clear distinction which must be made in a legislative scheme of taxation where United States securities are owned by the corportion taxed.

The law distinctly states that the plaintiff in error shall pay a tax, *as a tax upon its corporate franchise or business*, into the treasury of the State annually, and then provides the method of computation.

Franchises are special privileges conferred by government upon individuals; no franchise can be held which is not derived from a law of the State.

Bank of Augusta v. Earle, 13 Pet., 595.

The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property; and the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion.

Delaware R. R. Tax Case, 18 Wall., 206.

Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation * * * may be taxed by a State for the support of the State government. Authority to that effect resides in the State independent of the federal government.

Society for Savings v. Coite, 6 Wall., 594.
See, also, State Railroad Tax Cases, 92 U. S., 575.

The tax is a franchise tax because it is immaterial as to the value of the property of the corporation, because it is immaterial as to the value of its capital stock.

The amount of the tax does not depend upon the whole tax to be raised in the State; the assessment is made on the value of the franchise conferred and is measured by the dividend paying power.

The capital stock is simply used as a basis for computation.

The plaintiff in error is a domestic corporation; it exists by the laws of the State of New York; its residence is therein; there is the *situs* of its capital stock and franchises.

It cannot be seriously contended that the State may not tax it in some form.

It has chosen this method, and its action is final.

This tax, therefore, being a tax upon the *franchise* of the plaintiff, it matters not how its capital stock or property may be invested, whether in United States securities or otherwise.

People v. The Commissioners, 4 Wall., 244.
National Bank v. Commonwealth, 9 Wall., 353.
Van Allen v. The Assessors, 3 Wall., 573.

But we are not without the decision of this court upon this question.

A savings bank invested part of its deposits in securities of the United States, declared by Congress to be exempt from taxation by State

authority. The State of Connecticut required savings societies to pay three-quarters of one per cent on the total amount of deposits on a given day.

It was held that such tax was on the franchise and not on property; that it was valid; that the society was not exempt from taxation to the extent of the deposits so invested.

Society for Savings v. Coite, 6 Wall., 594.

Under a similar statute a savings bank in Massachusetts, which had part of its deposits invested in federal securities, was held liable to a tax on account of such deposits.

Provident Institution v. Mass, 6 Wall, 612.

A statute of Massachusetts required corporations having a capital stock to pay a tax of a certain percentage upon the excess of the market value of all such stock over the value of its real estate and machinery.

The Hamilton County Manufacturing Company showed that the cash market value of its capital stock did not exceed by more than $263,997 the value of its real estate and machinery, provided that the amount of securities of the United States was not included.

The State taxed the whole amount of excess, including the amount of Federal securities.

It was held that the tax was upon the franchise of the company and was lawful.

Hamilton Co. Man. Co. v. Mass, 6 Wall., 632.

"If the principal of such bonds can be considered as a basis for computing the amount of a franchise tax, the partial consideration of the income of such bonds for a similar purpose must be equally unobjectionable."

The Bank Tax Case of New York expressly distinguishes between a property and a franchise tax.

Bank Tax Case, 2 Wall., 209.

III.

THE TAX IN QUESTION BEING UPON THE FRANCHISES OF THE PLAINTIFF IN ERROR, THE FIRST SECTION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION HAS NO APPLICATION.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

There is nothing in this case showing an unequal exaction. It is true that in one sense one corporation may pay more than another, but in a comparative sense the exaction is equal — in proportion to their earning capacity and the value of their franchises they are taxed. Even were it not so a franchise tax is not within the rule of uniformity.

Ducat v. Chicago, 10 Wall., 410.

It is respectfully urged that this contention is based almost entirely upon a recent decision rendered in the case of The County of San Mateo v. The South Pacific Railroad Company, reported in 13 Federal Reporter, 722.

The county of San Mateo brought an action against the Southern Pacific Railroad Company to recover State and county taxes assessed upon the *property* of the company upon which there was a mortgage.

By the laws of California whenever an individual holds property incumbered with a mortgage, he is assessed at its value, after deducting from it the amount of the mortgage. If a railroad company holds property subject to a mortgage, it is assessed at its full value, without any deduction for the mortgage.

The railroad company refused to pay said taxes upon several grounds, one of which was that there was a discrimination made, palpable and gross between the taxation of the property of the individual and that of the corporation, and that thereby the corporation was denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution.

The court held :

1st. That private corporations are persons within the meaning of the first section of the fourteenth amendment.

2d. That as such persons, they are entitled, so far as their *property* is concerned, to the equal protection of the laws.

3d. That this equal protection forbids unequal exactions of any kind, and among them that of unequal taxation.

These are the main points affecting the case under consideration.

It is respectfully insisted that the broad scope given to the first section of the fourteenth amendment, by this decision, is not sustainable on principle or reason; that it was intended simply and solely to prevent discrimination against the negroes.

In the Slaughter-House Cases (16 Wall., 36, 81), this court says: "In the light of the history of these amendments (13, 14 and 15), and the pervading purpose of them which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where newly emancipated negroes resided, which discriminated with gross injustice and hardships against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." * * *

We doubt very much whether any action of a State, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."

But conceding, for the sake of argument, that the adoption of the fourteenth amendment has restricted the States in the exercise

of the taxing power, that decision in no way affects the power of the State to *classify* the property within its jurisdiction for the purpose of taxation.

The statutes of New York simply aggregate certain corporations into one class of taxpayers, and impose upon them a tax which is uniform as to the whole *class*. It is sufficient that the tax imposed be uniform and equal as to the class upon which it operates.

State R. R. Tax Cases, 92 U. S., 575, 611.

A State law for the valuation of property and the assessment of taxes thereon, which provides for the classification of property, subject to its provisions, into different classes, which makes for one class one set of provisions as to modes and methods of ascertaining the value and as to right of appeal, and different provisions for another class as to those subjects, but which provide for the impartial application of the same means and methods to all the constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it "equal protection of the laws," within the meaning of the fourteenth amendment to the Constitution.

Kentucky R. R. Tax Cases, 115 U. S., 321.

But the San Mateo case is a direct authority for the imposition of the tax in this case.

There the tax was one on *property* — here one on the *franchises*.

"Taxation on *business* in the form of "*licenses* may vary according to the calling "or occupation licensed, and the extent of "business transacted."

San Mateo County, 13 Fed. R., 737.

The distinction is well pointed out by Mr. Justice Clifford, in his opinion in the "Provident Institution" v. Massachusetts (6 Wall., 611).

Said he: "Franchise taxes are levied directly by an act of the Legislature, and the corporations are required to pay the amount into the State treasury.

"They differ from property taxes, as levied for State and municipal purposes, in the basis prescribed for *computing the amount*, in the manner of *assessment* and in the mode of *collection*."

The California decision, therefore, is of no application to this case.

IV.

THE FIRST SECTION OF THE FOURTEENTH AMENDMENT HAVING NO APPLICATION, THE LEGISLATURE, IN THE EXERCISE OF THE TAXING POWER, IS SUPREME, UNLESS LIMITED BY THE CONSTITUTION OF THE STATE.

Our court of last resort has decided the statutes in question to be constitutional and valid.

The People v. The Home Ins. Co., 92 N.Y., 328.

Its decision is final and there is no question before this court.

V.

The judgment should be affirmed, with costs.

DENIS O'BRIEN,
Attorney General of New York,
For Defendants in Error.

Office Supreme Court U. S.
FILED.
MAR 17 1890

OCTOBER TERM, 1889.

Supreme Court of the United States.

Error to the Supreme Court of New York.

THE HOME INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

against

THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

CHARLES F. TABOR, *Attorney-General of New York, of Counsel, Albany, N. Y.*

ALBANY:
THE ARGUS COMPANY, PRINTERS.
1890.

United States Supreme Court.

THE HOME INSURANCE COMPANY,
PLAINTIFF IN ERROR,
against
THE PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

Brief for Defendants in Error.

STATEMENT.

The plaintiff in error is a corporation created and organized under the laws of the State of New York, for the transaction of the business of fire insurance, and having its principal place of business in the city and county of New York.

The capital stock of said corporation is $3,000,000, and in the months of January and July, 1881, respectively, a dividend of $150,000 was declared and paid by said company. On the 1st of January, 1881, the corporation had its capital stock and surplus to the amount of $3,300,000 invested in United States government bonds; on July first it had reduced its investment in government securities to the sum of $1,940,000.

Chapter 542 of the Laws of 1880 of the State of New York, as amended by chapter 361 of the Laws of 1881, provided that every corporation organized under the

laws of the State of New York, should pay a tax as a tax upon its *corporate franchise or business* into the treasury of the State, to be computed, if the dividends amounted to more than six per cent, upon the par value of its capital stock, at the rate of one-quarter mill upon the said capital stock for each one per cent of dividend made or declared.

The Comptroller of the State of New York, in accordance with such law and using the amount of capital stock as a basis, computed a tax of two and one-half mills upon each dollar thereof, and demanded the payment of $7,500.

Payment was refused on the ground that the tax was upon the capital stock itself and not upon the franchise, and as a large portion of the capital stock was represented by United States securities, it was to that extent exempt from taxation by State authority.

The questions involved were upon a submitted case, finally decided by the Court of Appeals of the State of New York in favor of the defendant in error, and the tax held to be constitutional and valid.

Plaintiff in error appealed to this court, alleging that the act of the Legislature is in violation of the first section of the fourteenth amendment to the Constitution of the United States, which provides "that no State shall deny to any person within its jurisdiction the equal protection of its laws," and also alleging that the tax which was computed upon that portion of the capital stock which was invested in government bonds was "a tax upon *property* exempt by law from taxation."

The judgment of the Court of Appeals was affirmed here by a divided court, November 15, 1886. (119 U. S., 129.)

And a rehearing granted "because an important constitutional question was involved." (Shreveport v. Holmes, 125 U. S., 694.)

POINTS.

I.

THE DECISION OF THE COURT OF APPEALS ON THE CONSTRUCTION OF THE CONSTITUTION AND STATUTES OF NEW YORK WILL BE FOLLOWED BY THIS COURT.

Township of Ellenwood v. Macy, 92 U. S., 289.

Fairfield v. Gallatin Co., 100 U. S., 47.

Louisville, New Orleans and Texas Pacific R. R. Co. v. Mississippi, decided March 3, not reported.

Machine Co. vs Yaga, 100 U. S. 677.

Questions not decided in the State court, because not raised and presented by the complaining party, will not be re-examined in this court upon a writ of error.

Hamilton Company v. Mass., 6 Wall., 632.

Railway Co. v. Guthard, 114 U. S., 133.

Neither the records nor the opinions delivered in the courts below show that the precise and distinct question was raised or decided as to the statutes under consideration, being in violation of that clause of the fourteenth amendment of the Constitution of the United States

which provides: "That no State shall deny to any person within its jurisdiction the equal protection of its laws." Unless, therefore, this court can see that the question was necessarily raised by the construction given to the statutes cited by the Court of Appeals, then this court has no jurisdiction of the writ of error here.

Philadelphia Fire Association v. New York, 119 U. S., 116, and cases cited.

II.

THE TAX IMPOSED UPON THE PLAINTIFF IN ERROR WAS A TAX UPON ITS FRANCHISES, AND NOT UPON ITS PROPERTY OR CAPITAL STOCK.

The Laws of 1880 and 1881 provide as follows:

"SECTION 1. Hereafter it shall be the duty of the "president or treasurer of every association, corpora- "tion or joint-stock company liable to be taxed on *its* "*corporate franchise or business*, as provided in sec- "tion 3 of this act, to make report in writing to the "comptroller annually, on or before the fifteenth day "of November, stating specifically the amount of "capital paid in, the date, amount and rate per centum "of each and every dividend declared by their respec- "tive corporations, joint-stock companies or associa- "tions, during the year ending with the first day of "said month. In all cases where any such corporation, "joint-stock company or association shall fail to make "or declare any dividend upon either its common or "preferred stock during the year ending as aforesaid, "or in case the dividend or dividends made or declared

"upon either its common or preferred stock during the "year ending as aforesaid, shall amount to less than "six per centum upon the par value of the said com- "mon or preferred stock, the treasurer and secretary "thereof, after being duly sworn or affirmed to do and "perform the same with fidelity, according to the best "of their knowledge and belief, shall, between the first "and fifteenth days of November in each year in which "no dividend has been made or declared as aforesaid, "or in which the dividend or dividends made or declared "upon either its common or preferred stock amounted "to less than six per centum upon the par value of "said common or preferred stock, estimate and appraise "the capital stock of such company upon which no "dividend has been made or declared, or upon the par "value of which the dividend or dividends made or "declared amounted to less than six per centum, "at its actual value in cash, not less, however, "than the average price which said stock sold for "during said year; and when the same shall have "been so truly estimated and appraised they shall "forthwith forward to the Comptroller a certificate "thereof, accompanied by a copy of their said oath or "affirmation, by them signed. and attested by the "magistrate or other person qualified to administer "the same; provided, that if the Comptroller is not "satisfied with the valuation so made and returned, he "is hereby authorized and empowered to make a "valuation thereof and to settle an account upon the "valuation so made by him for the taxes, penalties "and interest due the State thereon; and any associa- "tion, joint-stock company or corporation, dissatisfied

"with the account so settled, may within ten days "appeal therefrom to a board consisting of the Secre- "tary of State, Attorney-General and State Treasurer, "which board on such appeal shall affirm or correct "the account so settled by the Comptroller, and the "decision of said board shall be final; but such appeal "shall not stay proceedings unless the full amount of "the taxes, penalties and interest as due on said "account, as settled by the Comptroller, be deposited "with the State Treasurer."

"§ 3. Every corporation, joint-stock company or "association, whatever, now or hereafter incorporated "or organized under any law of this State, or now or "hereafter incorporated or organized by or under the "laws of any other State or country, and doing busi- "ness in this State, except savings banks and institu- "tions for savings, life insurance companies, banks "and foreign insurance companies and manufacturing "corporations carrying on manufacture within this "State, which exception shall not be taken to include "gas companies or trust companies, shall be subject to "and pay a tax, *as a tax upon its corporate franchise "or business*, into the treasury of this State, annually, "to be computed as follows: If the dividend or divi- "dends made or declared by such corporation, joint- "stock company or association during any year ending "with the first day of November amount to six or "more than six per centum upon the par value of its "capital stock, *then the tax to be at the rate of one- "quarter mill upon the capital stock for each one per "centum of dividend so made or declared;* or if no "dividend be made or declared, or if the dividends

"made or declared do not amount to six per centum "upon the par value of said capital stock, then the tax "to be at the rate of one and one-half mills upon each "dollar of a valuation of the said capital stock made "in accordance with the provision of the first section "of this act, and in case any such corporation, joint-"stock company or association shall have more than "one kind of capital stock, as for instance common "and preferred stock, and upon one of said stocks a "dividend or dividends amounting to six or more than "six per centum upon the par value thereof, has "been made or declared, and upon the other no "dividend has been made or declared, or the dividend "or dividends made or declared thereon amount to "less than six per centum upon the par value thereof, "then the tax shall be at the rate of one-quarter mill "for each one per centum of dividend made or declared "upon the capital stock, upon the par value of which "the dividend or dividends made or declared amount to "six or more than six per centum, and in addition "thereto tax shall be charged at the rate of one and one-"half mills upon each dollar of a valuation, made also "in accordance with the provisions of this act, of the "capital stock upon which no dividend was made or "declared, or upon the par value of which the dividend "or dividends made or declared did not amount to six "per centum."

The foregoing sections of the act are the only ones with which the court here is concerned.

Prior to the passage of this act corporations were assessed and taxed upon their capital stock, under the

provisions of the Revised Statutes of the State of New York, by the local officials for both local and State purposes.

A comparison of those provisions (2 N. Y. R. S. [8th ed.], 1149 *et seq.*), with those of the act in question, shows radical differences in the method of assessment and collection of the taxes imposed upon these bodies, and clearly discloses the intention of the Legislature, in the enactment of the statutes of 1880 and 1881, to formulate a new and distinct scheme of taxation for all the corporate, associate or joint-stock bodies included within the terms of its provisions.

The law of 1881, upon which this question arises, recognizes the clear distinction which must be made in a legislative scheme of taxation where United States securities are owned by the corporation taxed.

The law distinctly states that the plaintiff in error shall pay a tax, *as a tax upon its corporate franchise or business*, into the treasury of the State annually, and then provides the method of computation.

Franchises are special privileges conferred by government upon individuals; no franchise can be held which is not derived from a law of the State.

Bank of Augusta v. Earle, 13 Pet., 595.

The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property; and the manner in which its value shall

be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion.

Delaware R. R. Tax Case, 18 Wall., 206.

Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation * * * may be taxed by a State for the support of the State government. Authority to that effect resides in the State independent of the federal government.

Society for Savings v. Coite, 6 Wall., 594.

See, also, State Railroad Tax Cases, 92 U. S., 575.

State Tax on Railway Gross receipts. 15 Wall 284

The tax is a franchise tax because it is immaterial as to the value of the property of the corporation, and because it is immaterial as to the value of its capital stock.

The amount of the tax does not depend upon the whole tax to be raised in the State; the assessment is made on the value of the franchise conferred and is measured by the dividend-paying power.

The capital stock is simply used as a basis for computation.

The plaintiff in error is a domestic corporation; it exists by the laws of the State of New York; its residence is therein; there is the *situs* of its capital stock and franchises.

It cannot be seriously contended that the State may not tax it in some form.

It has chosen this method, and its action is final.

This tax, therefore, being a tax upon the *franchise* of the plaintiff, it matters not how its capital stock or property may be invested, whether in United States securities or otherwise.

People v. The Commissioners, 4 Wall., 244.
National Bank v. Commonwealth, 9 Wall., 353.
Van Allen v. The Assessors, 3 Wall., 573.

Hebbs v. Virginia, 103 U. S. 350.

But we are not without the decision of this court upon this precise question.

A savings bank invested part of its deposits in securities of the United States, declared by Congress to be exempt from taxation by State authority. The State of Connecticut required savings societies to pay three-quarters of one per cent on the total amount of deposits on a given day.

It was held that such tax was on the franchise and not on property; that it was valid; that the society was not exempt from taxation to the extent of the deposits so invested.

Society for Savings v. Coite, 6 Wall., 594.

Under a similar statute a savings bank in Massachusetts, which had part of its deposits invested in federal securities, was held liable to a tax on account of such deposits.

Provident Institution v. Mass., 6 Wall., 612.

A statute of Massachusetts required corporations having a capital stock to pay a tax of a certain per-

centage upon the excess of the market-value of all such stock over the value of its real estate and machinery.

The Hamilton County Manufacturing Company showed that the cash market-value of its capital stock did not exceed by more than $263,997 the value of its real estate and machinery, provided that the amount of securities of the United States was not included.

The State taxed the whole amount of excess, including the amount of Federal securities.

It was held that the tax was upon the franchise of the company and was lawful.

Hamilton Co. Man. Co. v. Mass, 6 Wall., 632.

Mercantile Bank of New York, 121 U.S. 138.

"If the principal of such bonds can be considered as a basis for computing the amount of a franchise tax, the partial consideration of the income of such bonds for a similar purpose must be equally unobjectionable."

Ruger, J., p. 21, Record.

The Bank Tax Case of New York expressly distinguishes between a property and a franchise tax.

Bank Tax Case, 2 Wall., 209.

In the case of the Delaware Railroad Tax (18 Wall., 206), this court was called upon to construe an act of the Legislature of the State of Delaware taxing railroad and canal companies, passed on the 8th of April, 1869. The fourth section of the act provided that every company of the class designated should, in addition to other taxes, also pay to the treasurer of the State, for its use, on the first day of July then next, and on the

first day of July of each year thereafter, *a tax of one-fourth of one per cent upon the actual cash value of every share of its capital stock.*

This court held that the tax was not imposed upon the shares of the individual stockholders, or upon the property of the corporation, but was a tax *upon the corporation itself*, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock, a rule which, though an arbitrary one, was approximately just. "The State may impose taxes upon a corporation, as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property, and the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State."

And so under the Laws of Pennsylvania, 1874, No. 31, being "An act for the taxation of corporations," provides (section 7) that "every company, incorporated or organized by or under any law of this commonwealth, * * * which possesses the corporate right or privilege to mine, or to purchase and sell coal, shall semi-annually, in each and every year, make a report in writing to the Auditor-General of the number of tons of coal mined during the six months preceding, * * * and also of the number of tons not mined, as aforesaid, which shall have been purchased during the same period by

the said company, and shall pay into the treasury of the commonwealth *an additional tax upon its corporate franchises* at the rate of three cents upon each and every ton so mined or purchased as aforesaid."

The Supreme Court of Pennsylvania, in the case of the Kittinning Coal Company v. Commonwealth (79 Pa. St., 100), held: "That this statute was constitutional, and that 'such tax is not on the coal mined, but on the franchises, and is uniform.'" Section 7, above cited, was substantially re-enacted in section 9 of the Laws of 1879, page 118.

Phil. Con. vs Com 98 Pa. 53.

III.

THE TAX IN QUESTION BEING UPON THE FRANCHISES OF THE PLAINTIFF IN ERROR, THE FIRST SECTION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION HAS NO APPLICATION.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

There is nothing in this case showing an unequal exaction. It is true that in one sense one corporation may pay more than another, but in a comparative sense the exaction is equal — in proportion to their earning capacity and the value of their franchises they are taxed. Even were it not so a franchise tax is not within the rule of uniformity.

It is respectfully urged that this contention of the plaintiff in error is based almost entirely upon a decision rendered in the case of the County of San Mateo v. The South Pacific Railroad Company, reported in 13 Federal Reporter, 722.

The county of San Mateo brought an action against the Southern Pacific Railroad Company to recover State and county taxes assessed upon the *property* of the company upon which there was a mortgage.

By the laws of California whenever an individual holds property incumbered with a mortgage, he is assessed at its value after deducting from it the amount of the mortgage. If a railroad company holds property subject to a mortgage, it is assessed at its full value without any deduction for the mortgage.

The railroad company refused to pay said taxes upon several grounds, one of which was that there was a discrimination made, palpable and gross between the taxation of the property of the individual and that of the corporation, and that thereby the corporation was denied the equal protection of the laws guaranteed by the fourteenth amendment of the Federal Constitution.

The court held, among other things:

That the equal protection provided by the Constitu-stitution forbids unequal exactions of any kind, and among them that of unequal taxation.

Conceding, for the sake of argument, that the adoption of the fourteenth amendment has in some way restricted the States in the exercise of the taxing power, that in no way affects the power of the State to *classify* the property within its jurisdiction for the purpose of taxation.

The statutes of New York simply aggregate certain corporations into one class of taxpayers, and impose upon them a tax which is uniform as to the whole *class*.

It is sufficient that the tax imposed be uniform and equal as to the class upon which it operates.

State R. R. Tax Cases, 92 U. S., 575, 611.

A State law for the valuation of property and the assessment of taxes thereon, which provides for the classification of property, subject to its provisions, into different classes, which makes for one class one set of provisions as to modes and methods of ascertaining the value and as to right of appeal, and different provisions for another class as to those subjects, but which provide for the impartial application of the same means and methods to all the constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it "equal protection of the laws," within the meaning of the fourteenth amendment to the Constitution.

Kentucky R. R. Tax Cases, 115 U. S., 321.

See, also, Commonwealth v. Del. Division Canal Co., 123 Penn. St. R., 594.

But the San Mateo case is a direct authority for the imposition of the tax in this case.

There the tax was on *property*, here one on the *franchises*.

"Taxation on *business* in the form of *licenses* may "vary according to the calling or occupation licensed "and the extent of business transacted."

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The distinction is well pointed out by Mr. Justice Clifford in his opinion in the "Provident Institution" v. Massachusetts (6 Wall. 611).

Said he: "Franchise taxes are levied directly by an act of the Legislature, and the corporations are required to pay the amount into the State treasury.

"They differ from property taxes, as levied for State and municipal purposes, in the basis prescribed for *computing the amount*, in the manner of *assessment* and in the mode of *collection*."

The California decision, therefore, is of no application to this case.

IV.

THIS COURT HAS IN MANY CASES INDICATED THE RESTRICTIONS, LIMITATIONS AND QUALIFICATIONS WHICH ARE TO BE APPLIED TO THE WORDS: "NOR SHALL ANY STATE DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS," SHOWING CLEARLY THAT THEY CANNOT BE GIVEN THE BROAD CONSTRUCTION SOUGHT FOR THEM UNDER THE DECISION LAST CITED.

The following are a few of the decisions referred to and to which the attention of the court is now recalled:

"It is consequently for the State to determine, con-
"sistently with its own fundamental law, whether such
"property, owned by one of its residents, shall con-
"tribute by way of taxation to maintain the govern-
"ment. Its discretion in that regard cannot be super-
"vised or controlled by any department of the Federal
"government, for the reason, too obvious to require

"argument in its support, that such taxation violates "no provision of the Federal Constitution."

Kirtland v. Hotchkiss, 100 U. S., 499.

"The Constitution of the United States does not "profess in all cases to protect property from unjust "or oppressive taxation by the States. That is left to "the State Constitutions and State laws."

Memphis Gas Co. v. Shelby County, 109 U. S., 400.

"Class legislation, discriminating against some and "favoring others, is prohibited, but legislation which, "in carrying out a public purpose, is limited in its "application, if within the sphere of its operation it "affects alike all persons similarly situated, is not "within the amendment."

Barbier v. Connolly, 113 U. S. R., 32.

"The discriminations which are open to objection are "those where persons engaged in the same business "are subjected to different restrictions or are held "entitled to different privileges under the same con- "ditions. It is only then that the discrimination can "be said to impair that equal right which all can claim "in the enforcement of the laws."

Soon Hing v. Crowley, 113 U. S., 709.

"There is no evasion of the rule of equality within the "fourteenth amendment, where all companies are sub-

"jected to the same duties and liabilities, *under simi-*
"*lar circumstances.*"

Missouri Pacific R. R. Co. v. Humes,
115 U. S., 523.

"If a State statute creating a system of taxation does
"not, on its face, discriminate against national banks,
"and there is no other evidence of a legislative intent
"to make such discrimination, nor proof that the
"statute works an actual and material discrimination,
"there is no case for holding it to be unconstitutional."

Davenport Bank v. Davenport, 123
U. S., 83.

In construing a statute of Kansas, making railroad companies liable for all damages done to any employe in consequence of any negligence of its agents, etc., this court said:

"The objection that the law of 1874 deprives the rail-
"road companies of the equal protection of the laws
"is even less tenable than the one considered. It seems
"to rest upon the theory that legislation which is
"special in its character is within the constitutional
"inhibition; but nothing can be further from the fact.
"The greater part of all legislation is special, either in
"the object sought to be attained by it or in the extent
"of its application. * * * And when legislation
"applies to particular bodies or associations, imposing
"upon them additional liabilities, it is not open to the
"objection that it denies to them the equal protection
"of the laws, if all persons brought under its influence
"are treated alike *under the same conditions.* * * *
"Such legislation is not obnoxious to the last clause of

"the fourteenth amendment if all persons subject to it "*are treated alike under similar circumstances and* "*conditions*, in respect both to the privileges conferred "and the liabilities imposed."

Missouri Ry. Co. v. Mackey, 127 U. S., 209.

See, also, Minneapolis Ry. Co. v. Beckwith, 129 U. S., 32.

Bank of Redemption vs Boston 125 us 60

V.

It must be conceded that the Legislature of the State of New York has the power in some way to impose a "franchise tax" upon the corporations which it has created, and subject to its jurisdiction, and which tax thus imposed would not be held to be objectionable or unconstitutional because the property of the corporations affected by it consisted, in whole or in part, of United States bonds. The Legislature has, by the act of 1881 in question, expressly declared what the object and intention was, namely, to impose upon every corporation named, a tax "as a tax upon its corporate franchise or business." (See section 3, chap. 361, Laws 1881.) If the Legislature, then, has succeeded in what it attempted to do, it has, as we have seen, enacted a constitutional law. If it has not, as is claimed by the plaintiff in error, it has enacted an unconstitutional law. The question, then, is, will this court assume that, contrary to its declared intention, the Legislature of the State of New York has enacted an unconstitutional law?

It is an admitted rule of construction that "improper motives cannot be attributed to a State legislature in